BEFORE THE STATE WATER RESOURCES CONTROL BOARD

RESPONSE IN OPPOSITION TO MISSION VIEJO'S PETITION FOR REVIEW OF CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD SAN DIEGO REGION ORDER NO. R9-2002-0001 - NPDES PERMIT NO. CAS0108740 (ORANGE COUNTY MUNICIPAL STORM WATER PERMIT)

SWRCB/OCC FILE A-1465 (c)

Submitted by
California Regional Water Quality Control Board
San Diego Region
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I. INTRODUCTION

The City of Mission Viejo (Petitioner) has challenged the actions of the San Diego Regional Water Quality Control Board (SDRWQCB) in adopting Order No. R9-2002-0001, the Orange County Municipal Storm Water Permit (Permit). Although the Petitioner includes by reference the issues raised in other petitions for review filed with the State Water Resources Control Board (SWRCB) on this permit, the SDRWQCB respectfully awaits further SWRCB direction regarding the issues raised in those petitions, since those petitions are being held in abeyance at the request of the Petitioners. The SDRWQCB reserves the right to respond to the issues raised in those petitions separately as necessary.

In their appeal of the Permit, Petitioners employs a misguided and flawed across-the-board approach in their allegations that the SDRWQCB (1) placed obligations on the Petitioner that are not mandated or that violate the Clean Water Act or the Porter-Cologne Water Quality Act; (2) violated Article XIII(B) of the California Constitution; (3) violated prohibitions found in California Water Code (CWC) section 13260; (4) failed to support its actions with evidence in the record; (5) acted in an arbitrary and capricious manner and abused its discretion; and (6) violated state and federal law. It is worth noting that the 1993 Drainage Area Management Plan (DAMP), an enforceable component of Order No. 96-03 that the Petitioner acknowledges having "guided storm water management program for south Orange County," included descriptions of several BMP programs or requirements - accompanied by the relevant citations of regulatory and statutory authorities - similar to those included in the Permit that the Petitioner now contends are "intrusive" and unlawful.

These arguments, which are addressed in detail below, fail on many fronts. A central flaw in the Petitioner's appeal, which is relevant to several of their challenges, is the Petitioner's failure to discriminate between the issuance of a permit for the discharge of wastes and the process of rulemaking - such as the adoption of a Water Quality Control Plan. In addition, a preponderance of Petitioners' arguments have previously and repeatedly been heard and denied by the SWRCB; in particular, during the SWRCB hearings on the Los Angeles Regional Water Quality Control Board (LARWQCB) Standard Urban Storm Water Mitigation Plan (SUSMP) and the San Diego Municipal Storm Water Permit. The Petitioner, in citing those Orders, has also failed to observe that the SDRWQCB has incorporated the SWRCB's precendential direction found in those Orders into the Permit at issue. Other arguments cover issues typically addressed during the re-issuance of the Water Quality Control Plan - San Diego Basin Region 9 (Basin Plan), not storm water permits. Moreover, many arguments rely on Petitioners' apparently purposeful misrepresentation of both the Permit's and their own DAMP's requirements. Petitioners' arguments also heavily depend on an inverted burden of proof, attempting to place requirements on the SDRWQCB in adopting the Permit that are not merited. Nonetheless, contrary to the Petitioner's assertion, the Administrative Record

includes ample evidence that supports the Permit requirements and the SDRWQCB's adoption of the Permit.

For these reasons and many others (all discussed in more detail below), the Petitioner's appeal is without merit and should be denied.

II. ARGUMENTS

A. THE SDRWQCB FOLLOWED PROPER ADMINISTRATIVE PROCEDURE IN ADOPTING THE PERMIT

1. The Administrative Procedure Act (APA) Does Not Control The Issuance Of A Permit To Discharge Waste (Waste Discharge Requirements) Under The Federal National Pollution Discharge Elimination System Program (NPDES).

a. Issuance Of Waste Discharge Requirements And NPDES Permits Are Clearly Exempt From APA.

The Petitioner mistakes or misrepresents the issuance of a permit by the SDRWQCB to the Orange County Copermittees to discharge waste with the adoption of a regulation (i.e. that the SDRWQCB has engaged in rulemaking) even though they repeatedly and pointedly refers to the "Permit" rather than to a "Regulation" or "Rule" and to itself as a "Permittee" throughout its petition. In doing so, the Petitioner attempts to establish this contention based on the flimsy assertion that the SWRCB and Regional Water Quality Control Boards (RWQCBs), by incorporating measures to ensure statewide or region-wide consistency in their waste discharge requirements, have "triggered" the rulemaking process. The Petitioner also attempts to assert that the SDRWQCB engaged in rulemaking in interpreting and implementing a statute through informal procedures, but does not acknowledge that the adoption of the Permit by the SDRWQCB was hardly an informal procedure. The Petitioner compounds the error by attempting to equate the issuance of Waste Discharge Requirements by the SDRWQCB with the adoption of a Water Quality Control Plan (Basin Plan) and attempts to apply statutory requirements and judicial findings to the issuance of the Waste Discharge Requirements and NPDES permits that are only relevant to the adoption of the Basin Plan.

The Petitioner further contends that because the US EPA NDPES Regulations "do not set forth very specific requirements for the contents of a municipal stormwater NPDES permit,"[1] the "Permit" has been developed without compliance with the APA. Since the Permit is clearly not a regulation or a rule and has been specifically exempted by section 11352(b), this argument is without merit. However, it is noteworthy that the 1993

[1] Petitioner's Statement of Points and Authorities in Support of Petition for Review section III at p. 7.

DAMP clearly contemplated what requirements would be contained in future permits in a manner that contradicts the Petitioner's contention in this matter.[2]

The Petitioner attempts to evade the central fact that permits and waste discharge requirements issued under the Federal National Pollution Discharge Elimination System (NPDES) Program pursuant Phase I Storm Water Regulations (Federal NPDES Regulations), as authorized by section 402(p) of the Clean Water Act, cannot be construed as adopting a "regulation" or "rule." In adopting the Administrative Procedure Act (APA), the Legislature specifically exempted the adoption of permits by the SWRCB and RWQCBs. Government Code section 11352, erroneously cited by the Petitioner, states very plainly: "The following actions are not subject to this chapter: *** (b) **issuance, denial, or revocation of waste discharge requirements and permits pursuant to sections 13263 and 13377 of the Water Code**. . . ." (Emphasis added). The adoption of the proposed NPDES permit is an action pursuant to Water Code sections 13263 and 13377. The Legislature recognized that the adoption of permits is an action that applies solely to the named dischargers who are subject to the individual permit, and that the process that the RWQCBs follow to adopt a permit complies with notice, comment, and response requirements necessary under the RWQCBs' permitting authority. The SDRWQCB has properly noticed, provided ample opportunity for interested parties to comment on the draft Permit, provided detailed responses to the comments it received, conducted a lengthy public hearing on the matter in addition to two staff workshops, and considered the significance of the comments during its deliberations prior to adopting the Permit. Furthermore, the State Board has previously dispensed with this same argument comment in its review of the Los Angeles SUSMP.[3]

b. The SWRCB And RWQCBs Do Not "Trigger" The APA By Incorporating Similar Or Consistent Provisions In Their Waste Discharge Requirements Or NPDES Permits.

Contrary to the Petitioner's allegations, none of the applicable statutes or regulations preclude either the SWRCB nor the RWQCBs from incorporating findings or requirements in manner that ensures consistency of application or where similar measures, requirements, or controls may be deemed necessary for similar problems or conditions relevant to the discharge of waste. That the Permit was drafted to address urban runoff issues that are common all along the coast of the San Diego Region is not relevant with respect to the APA. The SDRWQCB is not precluded by the relevant

[2] 1993 DAMP Appendix E section 3.3. states: "Since issuance of Orange County's 'early' NPDES permit, EPA rules and regulations were promulgated (Federal Register November 16, 1990 Rules and Regulations, page 48069). **These will likely be the basis of any renewal of the Orange County municipal permits in 1995**." The discussion that follows includes many of the general permit requirements objected to by the Petitioner including conducting inspections necessary to determine compliance with permit conditions. AR 60.

[3] SWRCB Order 2000-11 addressed the issue in the adoption of the SUSMP and found that the adoption of a permit and Waste Discharge Requirements by the LARWQCB to be within its authority under the NPDES program and CWC section 13377 and not subject to the Administrative Procedures Act. AR 10.

statutes from adopting similar adopting waste discharge requirements that address similar waste discharge conditions and receiving water limitations. Furthermore, only the Copermittees named in the Permit are governed by the Permit and they may at any time request separate coverage under an individual permit. Moreover, they as well as any other interested persons have had ample opportunity to comment on the permit. The SDRWQCB's permitting of the MS4 is exempt from the APA. Thus, the Petitioner's contention that the issuance of the MS4 permit constitutes a "regulation" and is subject to the processes set forth in the Administrative Procedure Act (Govt. Code, § 11340, et seq.) is without merit and should be dismissed.

2. The SDRWQCB Followed The Proper Noticing And Public Hearing Procedures During the Adoption Of The Permit.

As discussed above, the SDRWQCB properly notified the interested parties and members of the public of its impending action on the Permit. Numerous public notices on the draft Order No. R9-2002-0001 (Tentative Order No. 2001-193) were published.[4] Included in those notices were the dates, locations, and times of 2 staff workshops, which were attended by the Executive Officer and Chairman of the SDRWQCB and the public hearing held on January 9, 2002. The SDRWQCB received and responded to 864 comments on the Tentative Order.[5] The SDRWQCB conducted a public hearing, which included testimony from over 74 persons, included extensive discussion of costs, impacts to local communities and government, the need for affordable housing, the impact to school districts, the need for improved Copermittee programs, and many other issues. The SDRWQCB properly considered and deliberated upon the facts presented in the Findings, supporting documents, the testimony it received, and evidence in the record before adopting Order No. R9-2002-0001.[6]

B. THE "SAFE HARBOR" RECEIVING WATER LIMITATIONS LANGUAGE SOUGHT BY THE PETITIONER IS CONTRARY TO RECENT SWRCB AND US EPA GUIDANCE AND DIRECTION AND THE SDRWQCB HAS PROPERLY PROVIDED FOR THE "ITERATIVE" PROCESS FOR COMLIANCE WITH THE RECEIVING WATER LIMITATIONS LANGUAGE.

The Petitioner raises in its appeal an issue that has been the subject of significant debate and contention before the SWRCB and the US EPA almost since the inception of the NPDES storm water program. The SDRWQCB is satisfied that the SWRCB, in conformance with the US EPA guidance, has provided the guidance and direction necessary to apply receiving water limitations and the iterative process handed down for

[4] Public Notices were published July 15, 2001, August 1, 2001, September 9, 2001, September 26, 2001, October 29, 2001, November 15, 2001, and December 3, 2001. AR 53, AR 64.
[5] SDRWQCB Fact Sheet/Technical Report Attachment 6 Response to Comments Document. AR 2.
[6] The February 13, 2002 SDRWQCB deliberation included informed direct questions to staff and discussions among SDRWQCB members prior to the 8-0 vote on the adoption of Order No. R9-2002-0001.

compliance with MS4 permits, and believes that the permits adopted with the SWRCB precendential language should now be allowed to go forward without additional challenges on this matter. Due to ongoing and repetitious debate regarding receiving water limitations, the SDRWQCB believes it is significant and necessary that the SWRCB reinforce Order WQ 99-05 and WQ 2001-15 by finding that the Petitioner has failed to raise new substantive issues and dismiss the Petitioner's appeal in this matter.

In its January 21, 1998 and March 17, 1998 letters to the SWRCB regarding the receiving water limitations language, US EPA makes clear that discharges which cause or contribute to an exceedance of water quality objectives are in violation of municipal storm water permits, regardless of whether or not an iterative BMP process is being implemented. US EPA states that "to enforce permits which correctly require compliance with WQS [water quality standards], EPA and other enforcers only have to prove that the discharger has caused or contributed to exceedances of WQS."[7] In other words, "the CWA [Clean Water Act] does not provide for […] an exception to compliance with standards," even if an iterative BMP implementation process is in place.[8] In addition, US EPA goes on to provide alternative receiving water limitations language to ensure that any receiving water limitations language is not misconstrued as supplying a "safe harbor" from necessary enforcement. This language was ultimately included in Order WQ 99-05. The proposal of this alternative language by US EPA, together with its subsequent adoption by the SWRCB in Order WQ 99-05, indicates that the Order WQ 99-05 receiving water limitations language does not provide dischargers with a shield from enforcement when MS4 discharges are causing or contributing to violations of water quality standards. In addition, as discussed in the Fact Sheet/Technical Report, the requirements in the Permit for compliance with the receiving water limitation are consistent with the decision in Defenders of Wildlife v. Browner, 1999, 197 F. 3d 1035.[9]

1. The "Safe Harbor" Language Is Contrary To Recent SWRCB Guidance And Direction

The SWRCB has handed down and amended precendential language to ensure compliance with Discharge Prohibitions and Receiving Water Limitations that the SDRWQCB has incorporated in the Permit. The Petitioner suggests the addition of "Safe Harbor" language from outdated MS4 permits and SWRCB Order WQ 98-01 that is not consistent with more recent SWRCB and US EPA direction. However, as documented below, this is an ill-informed and deeply flawed approach to the issue of receiving water limitations.[10]

[7] US EPA, 1998. January 21, 1998, Letter from Alexis Strauss, US EPA, to Walt Pettit, SWRCB, Re: SWRCB/OCC File A-1041 for Orange County. AR 15.
[8] US EPA, 1998. March 17, 1998, Letter from Alexis Strauss, US EPA, to Walt Pettit, SWRCB. AR 16
[9] Fact Sheet/Technical Report pp. 20, Attachment 6 Response to Comments Document at pp. 41-44, 54-55, 62-64, 86, 93-94, 111-116, 130-131, and 166-167. AR 2.
[10] Petitioner's Statement of Points and Authorities in Support of Petition for Review section IV at pp. 12-13.

It is important to note that no mention was made in either SWRCB Order WQ 99-05, WQ 2001-15, or any other subsequent guidance that the iterative BMP implementation process described in the receiving water limitations language was meant to provide municipalities with a shield from any enforcement in the event that their MS4 discharges cause or contribute to a violation of water quality standards. Indeed, SWRCB Order WQ 99-05 expressly amended Order WQ 98-01 in order to address US EPA concerns, which are discussed below, over the potential for just such an interpretation of Order WQ 98-01.[11] This fact directly contradicts the Petitioner's contention that no SWRCB order or directive dictated the deletion of the "Safe Harbor" language from the Receiving Water Limitations language.

The SWRCB has clearly stated that the "iterative approach, which focuses on timely improvement of BMPs" is the appropriate action in preference to "strict compliance" with water quality standards. The Administrative Record is replete with statements from the SDRWQCB that, in conformance with the SWRCB direction in the aforementioned Orders, it would rely upon the iterative process to ensure compliance with the Discharge Prohibitions and Receiving Water Limitations requirements rather than strict enforcement of those provisions.[12] Contrary to being "complementary," including a "safe harbor" of this type would undermine the very foundation of the iterative approach found in the Receiving Water Limitations language. In providing "safe harbor" language sought by the Petitioner, almost *any* plan would seem to be in compliance with the Permit irrespective of the lack or inadequacy of measures necessary to prevent excursions above receiving water quality objectives. This would effectively place the burden of proof back upon the SDRWQCB to demonstrate that the plan was inadequate. As discussed below, this is an inverted burden of proof to which the US EPA has previously objected. The SDRWQCB agrees with the US EPA and previous SWRCB direction and contends that mere implementation of a plan, particularly one that is poorly designed or incomplete, should not constitute a defense against any enforcement action. This has clearly not been the intent expressed by SWRCB. The SWRCB should now allow the RWQCBs the opportunity to fully implement the iterative process contained in the Receiving Water Limitations language as that language now stands.

[11] SWRCB Order WQ 99-05 states "In light of EPA objection to the receiving water limitation language in Order 98-01 and its adoption of alternative language, the State Board is revising its instructions regarding receiving water limitation language for municipal storm water permits. It is hereby ordered that Order 98-01 will be amended to remove the receiving water limitation language contained therein and to substitute the EPA language. Based on the reasons stated here, and as a precedent decision, the following receiving water limitation language shall be included in future municipal storm water permits….IT IS ORDERED that WQ 98-01 is revised as discussed above." AR 9.

[12] SDRWQCB Fact Sheet/Technical Report pp. 31-34, 45, 55-58, Attachment 6 Response to Comments Document pp. 36-37, 41-44, 65, 66-67, 73-74, 94-97, 194-195, Dave Gibson staff presentations at the July 19, 2001 and August 8, 2001 staff workshops attended by staff representing the City of Mission Viejo, staff presentation to the SDRWQCB at the January 9, 2002 public hearing on the draft Permit. AR 2, AR 32, AR 56, AR 57.

2. The Safe Harbor Language Is Contrary To Recent US EPA Guidance And Direction.

As noted above, US EPA has recently taken action in California on the matter of exceedances of receiving water quality objectives resulting from the discharges of urban runoff from MS4s. In its correspondence with the SWRCB and its veto of two MS4 permits, the US EPA has made clear its objection to the "safe harbor" language sought by the Petitioner.[13] The US EPA has concluded that such language is not in conformance with the Clean Water Act. The SWRCB subsequently provided Receiving Water Limitations Language that agrees with the US EPA guidance and direction.

The US EPA in a letter to the SWRCB commenting on the draft SWRCB Order WQ 98-01 stated:

> *Although the draft Order recognizes the applicability of WQS to MS4 permits, we are concerned with other aspects of the draft Order. While we appreciate that revision of the Orange County permit, which is the basis for this appeal, would create inconsistencies with the earlier Orange County permit issued by the Regional Water Quality Control, Santa Ana Region, in March 1996, the* ***permit includes language which concerns us. In particular, the phrase, 'permittees will not be in violation of this provision****…(if certain steps are taken to evaluate and improve the effectiveness of the Drainage Area Management Plan (DAMP))* ***is of the greatest concern to EPA****…we feel that it is necessary to state our disagreement with Conclusion 2 of the proposed Order, which would find that the quoted phrase, as used in the Orange County permit, complies with the CWA.*

The US EPA also observed that:

> *"Even in those cases which the draft Order contemplates as appropriate for enforcement and does not bar****, the phrases of concern to unacceptable increase the burden of proof in establishing permit violations****…To enforce permits which correctly require compliance with WQS,* ***EPA and other enforcers only have to prove that the discharger has caused or contributed to exceedances of the WQS….the addition of threshold evidentiary requirements by California is unacceptable****."*(Emphasis added).[14]

It is worth noting that the cited permit language, in particular the "the permittees will not be in violation…" clause, is essentially the "safe harbor" sought by the Petitioner. It is

[13] Petitioner's Statement of Points and Authorities in Support of Petition for Review state that the Petitioner seeks a safe harbor provision that will deem the Petitioner to be in compliance with the Permit once "they have implemented the storm water management programs set forth in the Permit in a timely and complete manner…" Section IV at p. 12.

[14] Letter from Alexis Strauss, Acting Director, Water Division, US EPA to Walt Pettit, Executive Officer, SWRCB dated January 21, 1998 SWRCB/OCC File A-1041 for Orange County. pp. 2-3. AR 15.

clear from this letter and subsequent US EPA correspondence and actions, that the US EPA objects to the "safe harbor" that the Petitioner now seeks to have restored to the Receiving Water Limitations language in the Permit at issue.

With that in mind, it should also be noted that, the US EPA felt compelled later to reiterate its objection to language in Order WQ 98-01. In a letter dated March 17, 1998, the US EPA stated:

> *Our letter of January 21, 1998 also noted the RWLs language would unacceptably increase the burden of proof in establishing permit violations…**We also like to reiterate our disagreement with Conclusion 2 of the Order regarding the consistency of the existing RWLs language in the Orange County permit with the CWA**. The RWLs language in the permit requires compliance with water quality standards as required by section 301(b)(1)(C) of the CWA and 40 CFR § 122.44(d)(1)(i), but then provides that "permittees will not be in violation of this provision' provided they follow up with certain additional actions to address any exceedances of water quality standards which occur. **The CWA does not provide for such an exception to compliance with standards**…. Our letter of January 21, 1998 also indicated that Region 9 would object to future State MS4 permits which include the RWLs language in the January 22, 1998 Order. As the Regional Boards and State Board move forward in finalizing RWLs in upcoming MS4 permits and permit appeals, **EPA is left in the unfortunate position of objecting to future permits until we can ensure water quality standards are adequately implemented in these permits**."* (Emphasis added)[15]

The US EPA subsequently vetoed the MS4 permits for Riverside County and the City of Vallejo, adopted by the San Diego and San Francisco Bay RWQCBs, which contained the "safe harbor" language opposed by the US EPA. In response, the SWRCB directed the RWQCBs to include Receiving Water Limitations language acceptable to the US EPA in WQ Order 99-05. This language did not contain "safe harbor" language and was included, as later amended by the SWRCB in Order 2001-15, in the Permit at issue. The Petitioner attempts to offer the Statewide General NPDES Permit for Discharges From Aquatic Pesticides to Waters of the United States, SWRCB WQO 2001-12 as an example of precedence for the kind of safe harbor language they seek. The Petitioners, however, fail to acknowledge that WQO 2001-12 applies to the specific application of aquatic pesticides and not to a MS4 discharge of urban runoff. Nor does the Petitioner acknowledge that, as discussed in the Response to Comments Document, other statewide permits (statewide general construction permit and CALTRANS permit) do not include "safe harbor" language and do provide that enforcement action by a RWQCB or SWRCB is not precluded.[16] To now restore this kind of "safe harbor" language would constitute a significant step backwards, would not be in conformance with the most recent SWRCB

[15] Letter from Alexis Strauss, Acting Director, Water Division, US EPA to Walt Pettit, Executive Officer, SWRCB dated March 17, 1998 in Response to SWRCB Order WQ 98-01. AR 16.
[16] Fact Sheet/Technical Report Attachment 6 Response to Comments Document at pp. 114. AR 2.

and US EPA guidance and direction.

3. The SDRWQCB Has Properly Provided For The Iterative Process For Compliance With The Receiving Waters Limitations.

As discussed above, the Administrative Record is replete with statements by the SDRWQCB that it intends to follow SWRCB guidance and direction in preferring the implementation of the iterative approach to strict compliance with water quality standards. Furthermore, the SWRCB found in Order WQ 2001-15 that the Receiving Water Limitations language in the San Diego permit was "consistent with the language required in Board Order WQ 99-05."[17] That Order modified Prohibition A.3 and C.2 of the San Diego Permit and the SDRWQCB promptly modified its draft Orange County MS4 Permit accordingly.[18] The Permit as adopted by the SDRWQCB conforms fully to all SWRCB guidance and direction for Receiving Water Limitations language in MS4 permits and with the iterative process approach in particular.

4. Mere Implementation Of Plans Cannot Ensure Compliance With Receiving Water Quality Objectives And Should Not Constitute A Shield From All Enforcement Actions.

It is worth repeating that merely implementing a plan is not adequate defense nor a shield against potential enforcement action, since the causative or contributive factors may not have been adequately address in the plan. The Petitioner cites Carson Harbor Village, Ltd. v. Unocal Corporate, 990 F. Supp. 1188 (C.D. Cal 1997) in attempt to demonstrate that a "safe harbor" clause is of critical importance to the Petitioner.[19] The Petitioner, however, fails to observe that the case concerned contaminated sediments and not receiving water quality limitations with a provision for compliance through iterative BMP implementation. Furthermore, it is interesting to note that the Orange County Water Quality Ordinance, which was adopted by the Petitioner, does not provide such a "safe harbor." The Orange County Water Quality Ordinance states "Compliance with the conditions and requirements of the DAMP shall not exempt any person from the requirement to independently comply with each provision of this Ordinance."[20] Contrary to the Petitioner's assertions, providing the "safe harbor" sought by the Petitioner is not necessary and, in fact, is counter-productive to the iterative process. Following the US EPA and SWRCB guidance discussed above, the iterative BMP implementation process described in the receiving water limitations language does not provide **authorization** for continued urban runoff discharges that cause or contribute to violations of water quality standards. Rather, it provides municipalities with a **process to ensure their return to**

[17] SWRCB Order WQ 2001-15 section II at p. 6. AR 11.
[18] Staff presentation by Dave Gibson before the SDRWQCB during the January 9, 2002 hearing on the draft Order No. R9-2002-0001. AR 32.
[19] Petitioner's Statement of Points and Authorities in Support of Petition for Review section IV at p. 13.
[20] 2000 DAMP Appendix E.1 Orange County Water Quality Ordinance section V.A.4 at p. E1-13. AR 17.

compliance with the receiving water limitations requirements in municipal storm water permits.

The SDRWQCB believes it is important to be in clear agreement with the US EPA that municipal separate storm sewer system (MS4) discharges that cause or contribute to violations of water quality standards are in violation of municipal storm water permits. In addition, this non-compliance status continues, regardless of whether or not a municipality is in an iterative BMP implementation process, until the discharge is no longer causing or contributing to a violation of water quality standards. This approach is consistent with SWRCB Order WQ 99-05 and the aforementioned US EPA guidance and actions on this matter. The US EPA clearly enunciated its position to this effect when referring to 40 CFR 122.44(d)(1)(i) it stated " This requirement clearly applies to all excursions above WQS" (emphasis in original).[21] The US EPA further observes, and the SDRWQCB agrees, that "the provisions which US EPA objected to are concepts which are not objectionable in the context of an exercise of enforcement discretion."[22] This approach is reflected in the SWRCB WQ Orders 99-05 and WQ 2001-15 and the SDRWQCB's stated preference for implementation of the "iterative process," but does not excuse excursions above receiving water quality objectives caused or contributed to by discharges from permitted MS4s.

Nonetheless, while the SDRWQCB finds that cooperative, responsive actions on the part of the discharger to address MS4 discharges that cause or contribute to violations of water quality standards are crucial factors in it's decision regarding possible enforcement options, less effective actions (i.e. implementing a management plan) cannot be considered a shield from all enforcement in the event that water quality standards continue to be violated. If there is a lack of good faith effort on the part of the discharger to implement the iterative BMP process effectively, the SDRWQCB maintains that the potential threat of enforcement is a necessary incentive to help ensure timely and adequate action by the discharger. As such, the SDRWQCB believes the SWRCB should uphold the discretion of the RWQCBs by maintaining that the iterative BMP process is not a shield for enforcement. This will provide RWQCBs with the capability necessary to protect the water quality of the state's receiving waters and the opportunity to fully employ the language handed down by the SWRCB in its Orders on this matter.

For these and all the foregoing reasons, the SWRCB should uphold its previous actions and the Permit language as adopted by the SDRWQCB and dismiss the Petitioner's appeal in this matter.

[21] Letter from Alexis Strauss, Acting Director, Water Division, US EPA to Walt Pettit, Executive Officer, SWRCB dated January 21, 1998 SWRCB/OCC File A-1041 for Orange County. p. 2. AR 15.
[22] Letter from Alexis Strauss, Acting Director, Water Division, US EPA to Walt Pettit, Executive Officer, SWRCB dated January 21, 1998 SWRCB/OCC File A-1041 for Orange County. p. 2. AR 15.

C. THE SDRWQCB IS NOT REQUIRED TO COMPLY WITH CEQA WHEN ADOPTING THE PERMIT

The Petitioner argues that the SDRWQCB is required to review potential significant environmental impacts before issuance of the Permit. This is an issue that has been repeatedly raised and rejected by the SWRCB.[23] As noted by the Petitioner, Finding 39 cites Water Code 13389, which relieves the SDRWQCB of any obligation to prepare environmental impact documentation under the California Environmental Quality Act (CEQA) prior to issuing waste discharge requirements, such as the Permit. The "project" in this case, which would purportedly be subject to CEQA, is issuance of requirements for discharges in MS4s, an action required by the CWA and the Federal NPDES Regulations. Therefore, CWC section 13389 applies to the issuance of the Permit. The SWRCB has agreed that NPDES permits do not require CEQA documentation in WQ Order 2000-11, stating "the provisions of CEQA requiring adoption of environmental documents […] do not apply to NPDES permits."

Petitioners further contend that the Permit contains provisions which are not specifically required by the CWA or Federal NPDES Regulations; however, all provisions are intended to implement or clarify specific minimum requirements in applicable federal regulations to protect water quality of waters of the United States within the San Diego Region. The fact that some of the specific requirements of a regional board order may be more detailed than the nationwide **minimum** standards for MS4 regulation prescribed by the CWA and Federal NPDES Regulations in 40 CFR 122.26 does not abrogate this exception. In fact, the Clean Water Act contemplated this contingency by authorizing "other provisions as the Administrator or the State determines appropriate for the control of such pollutants."[24] Clearly, although the Permit may include more specific details, the requirements themselves are firmly founded in the Clean Water Act and Federal NPDES Regulations.

The SWRCB agreed with the SDRWQCB during its review of the San Diego MS4 permit and confirmed its previous findings in Order WQ 2001-15. In Order WQ 2001-15, the SWRCB stated "(Petitioner) contends that the exemption from CEQA contained in section 13389 applies only to the extent that the specific provisions of the permit are required by the federal Clean Water Act. **This contention is easily rejected without addressing whether federal law mandated all of the permit provisions**. The plain language of section 13389 broadly exempts the Regional Water Quality Board from the requirements of CEQA to prepare environmental documents when adopting 'any waste discharge requirement' pursuant to Chapter 5.5 (§§13370 et seq., which applies to NPDES permits). " This language was cited by the SDRWQCB in the Administrative

[23] SWRCB Order WQ 2001-15 states "As we have stated in several prior orders, the provisions of CEQA requiring adoption of environmental documents do not apply to NPDES permits." At p. 13; footnote 24 references Board Order 2000-11 as an example. AR 11.
[24] Clean Water Act section 402(p)(3)(B)(iii). AR 24.

Record in the Response to Comments Document, subsequently appended to the Fact Sheet/Technical Report for Order No. R9-2002-0001.[25]

For these reasons, the Petitioner's contention that the SWRCB should find that the action of the SDRWQCB adopting the Permit was inconsistent with the law and an abuse of discretion is contrary to previous findings and direction from the SWRCB and should be rejected. The Petitioner's assertion that the Permit be remanded to the SDRWQCB with direction to comply with all non-exempted portions of CEQA and modify Order No. R9-2002-0001 based on the outcome of the mandated CEQA policy analysis per 23 C.C.R. §3733 is without merit and should be dismissed.

D. THE PERMIT'S REQUIREMENTS ARE CONSISTENT WITH THE "MAXIMUM EXTENT PRACTICABLE STANDARD" (MEP).

In its contention that the SDRWQCB has re-characterized the MEP standard, the Petitioner clearly fails to recognize that municipal storm water permits are BMP-based permits and that Congress and the US EPA contemplated that BMPs would implemented by permittees across a continuum of conditions. Recognizing, as did the US EPA in its preamble to the Federal NPDES Regulations, [26] that pollutants in discharges to the MS4 will be conveyed and discharged from the MS4 to Waters of the United States, the SDRWQCB included in the Permit certain requirements for the Copermittees to implement or require the implementation of BMPs to the MEP to control the discharge of pollutants into the MS4. In particular, this approach to compliance with the Clean Water Act encompasses the **broad range of pollution prevention and source reduction BMPs that seek to immediately lessen the pollutant loading in discharges from MS4s to waters of the state**. The Federal NPDES Regulations support this approach at multiple points especially for construction and industrial discharges and for non-storm water discharges in general. Furthermore, the SWRCB recognized that this approach had merit in its review of the San Diego Permit in the statement "It is certainly true that in most instances it is more practical and effective to prevent and control pollution at its source...It is important to emphasize that dischargers into MS4s continue to be required to implement a full range of BMPs including source control."[27] The SDRWQCB incorporated the changes in the Permit mandated by the SWRCB in Order WQ 2001-15 with regard to the Prohibition language regarding discharges into the MS4.

[25] Fact Sheet/Technical Report Attachment 6 pp. 31-33 Response to comments submitted by County of Orange, the City of Laguna Niguel, the Construction Industry Coalition on Water Quality, and the City of Aliso Viejo. AR 2.

[26] "…the nature and extent of pollutants in discharges from municipal systems will depend on the activities occurring on the lands which contribute runoff to the system." US EPA 1990 Preamble to National Pollution Discharge Elimination System Permit Application Regulations for Storm Water Discharges. Section VI.G.3 Federal Register Vol. 55 No. 222. AR 65.

[27] SWRCB Order WQ 2001-15 p. 10. AR 11.

1. The Clean Water Act Provides Broad Legal Authority To the SDRWQCB to Require Controls Of Pollutants Into The MS4.

The Petitioner cites the Clean Water Act section 402(p) that states that permits may be issued for discharges "from municipal storm sewers…to reduce the discharge of pollutants to the maximum extent practicable" as implicitly establishing a limitation on the application of BMPs to the end of the pipe.[28] While the MEP standard is ultimately applicable at the point of discharge, the Petitioner fails to note, however, that Clean Water Act section 402(p)(3)(B)(iii) does not limit the application of "controls to reduce the discharge of pollutants to the maximum extent practicable" to the point of discharge. In fact, the Clean Water Act goes on to state that the controls may include "**management practices, control techniques** and system design and engineering methods **and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants**."[29] This broad legal authority, which is cited repeatedly by the SDRWQCB throughout the Fact Sheet/Technical Report and was the subject of comments submitted by the Petitioner[30], provides justifiable statutory and regulatory support for requiring the application of a full range of BMPs to the MEP, including pollution prevention management practices and source reduction control techniques. Moreover, the US EPA guidance demonstrates the need for site-specific BMP implementation and inspections to ensure compliance.[31] The SDRWQCB has found in multiple findings[32] and throughout the Fact Sheet/Technical Report[33] that these provisions are necessary and appropriate for the control of such pollutants.

2. Federal NPDES Regulations Specifically And Implicitly Support Requirements To Reduce Or Prevent Discharges Of Pollutants To The MS4

[28] City of Mission Viejo Petition for Review section E.d (pp.8-9) cites section 402(p)(3)(B) and 402(p)(3)(b)(iii).
[29] Clean Water section 402(p)(3)(B)(iii). AR 24.
[30] Fact Sheet/Technical Report Attachment 6 Response to Comments Document pp. 123-125 Comments submitted by Mission Viejo, Laguna Hills, Richard Watson and Associates, Dana Point, County of Orange, Laguna Niguel, Construction Industry Coalition on Water Quality. AR 2.
[31] See for example pp. 6-13 to 6-15 and 6-19 to 6-21 in U.S. Environmental Protection Agency. 1992. Guidance Manual for the Preparation of Part II of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems. Washington D.C. EPA 833-B-92-002. AR 27.

[32] Findings 3, 4, 5, 6, 9, 12, 21, 28 and 38 each provides support for more stringent requirements. In particular Finding 21 "Changes Needed" states that "Because of the urbanization is a direct and leading cause of water quality degradation in this Region**, fundamental changes to existing policies and practices about urban development are needed** if the beneficial uses of the San Diego Region's natural Water resources are to be protected." (Emphasis added). AR 1.
[33] The Fact Sheet/Technical Report provides discussion of: (1) the impacts of urban runoff to water quality, public health, and beneficial uses (Section II Background – Impacts of Urban Runoff); (2) economic impacts resulting from discharges of polluted runoff (Section III Economic Issues); and programmatic shortcomings of the previously implemented programs (Section IV Permit Summary). The need for specific permit requirements, pollutant controls, or BMP program strategies are discussed at many points throughout sections VI and VII of the Fact Sheet/Technical Report. AR 2.

The Federal NPDES Regulations provide specific and implicit direction and support for the implementation of BMPs and other controls to prevent or reduce pollutants in discharges into the applicant's MS4. As previously discussed, the US EPA has observed that "…the nature and extent of pollutants in discharges from municipal systems will depend on the activities occurring on the lands which contribute runoff to the system." [34] The US EPA also stated that:

> *"In light of its construction of the term discharge, EPA has consistently maintained that a person who sends pollutants from a remote location* ***through a point source into a water of the U.S****. may be held liable for the unpermitted discharge of that pollutant. Thus, the EPA asserts the authority to* ***require a permit either from the operator of the point source conveyance, (such as a municipal storm sewer*** *or a privately-owned treatment works), or from any person causing pollutants to be present in that conveyance and discharged through the point source****, or both****."* (Emphasis added)[35]

Both of these statements place the requirements of the Federal NPDES Regulations discussed below into the context of controlling pollutants at least in part through the implementation of pollution prevention and source reduction management practices, control techniques, and design features for discharges to the MS4. It is worth noting that the US EPA in this document and the regulations themselves did not preclude the application of BMPs at locations above the point of discharge to receiving waters, including the implementation of BMPs prior to discharge into the MS4.

Federal NPDES Regulations at 40 CFR § 122.26(d)(2)(iv)(D) require that MS4 have a program "to reduce pollutants in storm water runoff from construction sites **to** the municipal storm sewer system…" (Emphasis added). Similarly, 40 CFR § 122.26(d)(2)(iv)(B)(7) requires that the Copermittees provide "A description of controls to limit infiltration of seepage from municipal sanitary sewers to municipal separate storm sewer systems…" In addition, 40 CFR § 122.26(d)(2)(iv)(C) requires applicants to provide a description of a program to monitor and control pollutants in storm water discharges to municipal systems from municipal landfills, hazardous waste treatment, disposal and recovery facilities, industrial facilities that are subject to section 313 of title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA), and industrial facilities that municipal permit applicant determines are contributing a substantial pollutant loading to the municipal storm sewer system." The regulations also implicitly include provisions for pollution controls to be implemented to reduce pollutants in MS4 discharges from residential and commercial areas.[36] With respect to

[34] US EPA 1990 Preamble to National Pollution Discharge Elimination System Permit Application Regulations for Storm Water Discharges. Section VI.G.3 at 47038. Federal Register Vol. 55 No. 222. AR 65.
[35] US EPA 1990 Preamble to National Pollution Discharge Elimination System Permit Application Regulations for Storm Water Discharges. Section VI.B at 47998. Federal Register Vol. 55 No. 222. AR 65.
[36] 40 CFR §122.26(d)(2)(iv)(A) "A description of structural and source control measures to reduce pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system…" AR 23.

land use planning, the Federal NPDES Regulations also imply that applicants include BMPs for new development to address the discharge of pollutants from areas of new development.[37] In regards to the application of pesticides, herbicides, and fertilizers, the Federal NPDES Regulations again imply that controls should be implemented to reduce pollutants entering the MS4, which will be subsequently discharged, from MS4s to waters of the state.[38] These regulations also require a program to address discharge of pollutants into MS4s from operating or closed landfills and other treatment, storage or disposal facilities for municipal waste.[39] It is clear that in addition to the broad legal authority provided in the Clean Water Act section 402(p)(3)(B)(iii), the implementing regulations also provide support and regulatory basis for the SDRWQCB Permit's requirements to control the contribution of pollutants in discharges to the Copermittee's MS4s.

3. Recent SWRCB Direction Supports Including Controls To Prevent Or Reduce Pollutants In Discharges To The MS4

Contrary to the Petitioner's assertions, recent SWRCB decisions generally support requirements for BMPs to reduce or prevent pollutants in discharges to the MS4. In Order WQ 2000-11 supporting SUSMP requirements included in the Permit, the SWRCB stated that "(SUSMPs) are aimed at limiting not just the pollutants in runoff from the new development, but also the volume of runoff that enters the municipal storm sewer system. By limiting runoff from new development, the SUSMPs prevent increased impacts from urban runoff generally. There is adequate technical information in the record to show that by controlling the volume of runoff from new development, BMPs can be effective in reducing the discharge of pollutants in storm water runoff."[40] In its finding supporting the LARWQCB's action in adopting the SUSMPs, the SWRCB also notes that " The County's proposed SUSMPs also included language requiring minimizing the introduction of pollutants to the storm water conveyance system. That language remains unchanged in the Final SUSMP."[41]

In its argument that permit language is contrary to recent SWRCB direction in Order WQ 2001-15, the Petitioner selectively quotes from the Order and fails to note that the Permit was (1) revised to conform to that Order and (2) the Order spoke to a specific Prohibition (A.3) and clearly did not apply to the San Diego Permit as a whole. As discussed above, the direction from the SWRCB included recognition of the practicality and regulatory

[37] 40 CFR §122.26(d)(2)(iv)(A) "A description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to **reduce the discharge of pollutants from municipal separate storm sewers <u>which receive</u> discharges from areas of new development and significant redevelopment**" (emphasis added). AR 23.

[38] 40 CFR §122.26(d)(2)(iv)(A)(6) "A description of a program to reduce to the maximum extent practicable, pollutants in discharges from municipal separate storm sewers associated **with the application of pesticides, herbicides and fertilizers which include, as appropriate, controls such as educational activities, permits, certifications and other measures <u>for commercial applicators and distributors</u>**, and controls for application in public right-of-ways and at municipal facilities."(emphasis added) AR 23.

[39] 40 CFR §122.26(d)(2)(iv)(A)(5). AR 23.

[40] SWRCB Order WQ 2000-11 p. 5. AR 10.

[41] SWRCB Order WQ 2000-11 p. 12. AR 10.

support for controls of pollutants (i.e. BMPs) in discharges to the MS4s since treatment of MS4 flows is rarely provided prior to discharge to receiving waters. Moreover, as discussed in Finding 8 of the Permit and acknowledged by the SWRCB, the Copermittees have incorporated Waters of the United States into their MS4 systems, rendering it all the more necessary to implement BMPs that include a broad range of management practices, control techniques, and system designs, including source control. This is the intent of Finding 10, which was cited by the Petitioner.[42] Rather than exceeding the requirements of the Clean Water Act, as the Petitioner contends, the Permit requirements are firmly based on the Clean Water Act and within the authority granted the State in that legislation. With regard to Prohibition A.1, the Petition fails to note that this is a Basin Plan Prohibition and that permits issued by the SDRWQCB must comply with the Basin Plan requirements and prohibitions.[43] With respect to section D of the permit, the requirements contained therein are for the Copermittees to certify legal authority to control discharges to their MS4; a requirement originating in the Federal NPDES Regulations and based upon section 402(p)(3)(B)(ii-iii) of the Clean Water Act.[44] The requirements cited by the Petitioner do not exceed the requirements or authority provided by the Clean Water Act and as the Petitioner disingenuously misrepresents both the SWRCB direction and Clean Water Act section 402(p)(3)(B), its arguments on these points should be dismissed.

4. <u>The Application Of BMPs To Prevent Or Reduce Pollutants In Storm Water Discharges To The MS4 Is Subject To The MEP Standard Rather Than A "Re-Characterization" Of The MEP Standard.</u>

The Petitioners contend that the requirements to implement BMPs to prevent or reduce the discharge of pollutants into the MS4 are contrary to the MEP standard. In fact, BMPs required under a municipal storm water permit are to be implemented **subject to** the MEP standard regardless of the physical location of their application. In particular, this approach encompasses the broad range of pollution prevention BMPs and source reduction BMPs, which are, by definition, implemented to prevent or reduce pollutants in discharges to the MS4 to the MEP. **It is through the implementation of a full range of BMPs, including those directed at preventing or reducing pollutants at their sources, that the MS4 discharges of pollutants to the waters of the United States (or waters of the state) are reduced to the MEP**.

This approach is consistent with the most recent SWRCB and US EPA guidance and represents a potentially significant more cost-effective approach than "traditional end-of-pipe approaches" (e.g. Publicly Owned Treatment Works). In fact, as described (and supported by numerous references to statutory and regulatory references) by SWCRB staff in a letter to the Executive Officer of the LARWQCB dated November 9, 2001 "Congress created the "maximum extent practicable" (MEP) standard and the

[42] City of Mission Viejo, Petitioner's Statement of Points and Authorities in Support of Petition for Review Section VI p. 16.
[43] Water Quality Control Plan, San Diego Basin Region 9. AR 4.
[44] 40 CFR 122.26(d)(2)(I)(B,C,E, and F) and 40 CFR 122.26(d)(2)(iv). AR 23.

requirement to "effectively prohibit non-stormwater discharges" into the MS4 in an effort to allow permit writers the flexibility necessary to tailor permits to the site-specific nature of MS4 discharges…The flexibility includes the ability to direct permit requirements at the sources of pollution, and not simply the MS4 discharge points" [45]

It is clear that in developing regulations to implement the MS4 requirements, the US EPA identified specific program elements to be implemented to the MEP that a municipal discharger had to identify as part of the MS4 permit application. [46]Again, these were application requirements that in many instances identified the **minimal authority** that the municipal discharger must demonstrate as part of an application.[47] As further noted by the SWRCB in the aforementioned letter, "Nothing in the regulations erodes the Regional Board's authority to establish provisions it deems "appropriate for the control of [] pollutants" in the MS4. (33 U.S.C. § 1342(p)(3)(B)(iii); see also *Defenders of Wildlife v. Browner* (9 th Cir. 1999) 191 F.3d 1159, 1166-1167 (discussing permitting authorities' authority to establish appropriate requirements in storm water permitting approach).) In fact, the US EPA contended during the rulemaking that:

> *'Proposed management programs will then be evaluated in the development of permit conditions. * * * EPA anticipates that storm water management programs will evolve and mature over time. The permits for discharges from municipal separate storm sewer systems will be written to reflect changing conditions that result from program development and implementation and corresponding improvements in water quality."*[48]

The Preamble also includes a lengthy discussion regarding the implementation of controls for discharges to the MS4 from commercial and residential areas, discharges resulting from the application of pesticides, herbicides and fertilizers, and construction sites and industrial facilities. Any doubt that language in the Federal NPDES Regulations requires application of controls subject to the MEP in MS4 permits for discharges to the MS4 is laid to rest in the plain language of the US EPA in its Preamble to the Federal NPDES Regulations.[49] For all of the foregoing reasons, the Petitioners assertions in that the SDRWQCB has "re-characterized" the MEP standard fail and should be dismissed.

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[45] Letter from Michael A.M. Lauffer, Staff Counsel to Dennis Dickerson, Executive Officer, Regional Water Quality Control Board, Los Angeles Region on Legal Issues Concerning Renewal of Order No. 96-054, As Reflected in Tentative Waste Discharge Requirements Dated October, 11, 2001. AR 66.
[46] 40 C.F.R. § 122.26(d). AR 23.
[47] 40 C.F.R. § 122.26(d)(2)(iv) provides and example of these requirements. AR 23.
[48] US EPA 1990 Preamble to National Pollution Discharge Elimination System Permit Application Regulations for Storm Water Discharges. Section VI.H.7 at 48052. Federal Register Vol. 55 No. 222. AR 65
[49] US EPA 1990 Preamble to National Pollution Discharge Elimination System Permit Application Regulations for Storm Water Discharges. VI.H.7 at pp. 48052- 48056. Federal Register Vol. 55 No. 222. AR 65

5. The Petitioner's Reports And DAMP Demonstrate That Implementation Of BMPs To The MEP To Control The Discharge Of Pollutants To The MS4 Is Common Practice And Has Been Considered Lawful And Necessary.

As documented in the Petitioner's own 2000 Annual NPDES Progress Report and DAMP, the Orange County Copermittees routinely implement BMPs to reduce or prevent pollutants in discharges to the MS4. The Executive Summary of the 2000 Annual NPDES Progress Report makes this clear when it states "Section 2.0 includes a discussion of the **specific requirements for legal authority to control pollutant contributions to the storm drain system**… All of the Permittees routinely conduct **preventive maintenance activities** that are widely recognized as **effective BMPs for pollutant control"**(emphasis added).[50] Section 8.2 of the Annual NPDES Progress Report submitted in November 2001 includes one of many examples of this practice when it states "The 2000 DAMP describes the programs that will serve to…3) **Improve existing pollution prevention and removal BMPs to further reduce the amount of pollutants entering the storm drain system**" (emphasis added).[51] With regard to illicit discharges and illegal connections, the DAMP, citing the Clean Water Act and Federal NPDES Regulations, states that: "The Permittees will continue to vigorously detect and eliminate illegal discharges and illicit connections **into the storm drain system**." [52] The requirements in section D of the Permit challenged by the Petitioner specifically address this commitment expressed by the Copermittees, including the Petitioner, in the DAMP. Moreover, the Petitioner themselves have proposed to conduct activities they now claim to be illegal. for example, five of the ten objectives listed in section 8.2 of the Annual Progress Report identify programs that will be undertaken by the Copermittees to reduce pollutants in discharges **to** the MS4. In fact, three of these programs specifically state that control of pollutants **to the MS4 is the objective**.[53] These statements, which are only a few of many, demonstrate that the Petitioner and other Orange County Copermittees have historically accepted that controlling the discharge of pollutants into the MS4 system is (1) consistent with the Clean Water Act and implementing Federal NPDES Regulations and (2) represents a cost-effective and practicable approach previously employed by the Copermittees to reduce pollutants in the discharge of urban runoff from MS4s to waters of the state. Indeed, this is not surprising since both previous permits and the original 1993 draft of the permit also included references and requirements to this point.[54, 55,56] On

[50] 2000 NPDES Annual Progress Report November 15, 2000 Executive Summary "Section 2.0 includes a discussion of the specific requirements for legal authority to control pollutant contributions to the storm drain system, the use of this authority to eliminate illegal discharges…Section 3.0…All of the Permittees routinely conduct preventive maintenance activities that are widely recognized as effective BMPs for pollutant control"; Section 8.2 p. 69. AR 18

[51] 2000 NPDES Annual Progress Report November 15, 2000 section 8.2 Objectives of the Drainage Area Management Plan p. 69. AR 18.

[52] Report of Waste Discharge Volume 2A of 4 Proposed Plan Draft Drainage Area Management Plan second edition September 2000 section 1.3 Objectives of the Drainage Area Management Plan. AR 17.

[53] 2000 NPDES Annual Progress Report November 15, 2000 section 8.2 Objectives of the Drainage Area Management Plan p. 69. AR 18.

[54] Order No.90-38 Finding 9 states "This Order requires the permittees to develop and implement programs to ensure that entities discharging stormwater/urban runoff into stormwater conveyance systems take steps to control/reduce discharges of pollutants to waters of the United States." Section III.A of that permit states "The permittee shall prohibit illicit/illegal discharges from entering into stormwater conveyance systems."

the basis of these facts alone, the Petitioner's assertions regarding the legality and applicability of BMPs to control the discharge of pollutants to the MS4 are without merit and should be dismissed.

For all of the foregoing reasons the Petitioner's challenges on this matter are without merit and should be dismissed.

E. THE SDRWQCB HAS NOT MANDATED THE MANNER OF COMPLIANCE IN VIOLATION OF CALIFORNIA WATER CODE SECTION 13360 AND IT IS APPROPRIATE FOR MUNICIPAL STORM WATER PERMITS TO CONTAIN A DETAILED AND SPECIFIC FRAMEWORK OF REQUIREMENTS FOR THE STORM WATER QUALITY MANAGEMENT PROGRAM.

The Petitioner asserts that "numerous provisions" within the Permit impose the specific design, location, type of construction or particular manner in which compliance may be had with the Permit. Specifically, the Petitioner cites (1) the SUSMP requirements; (2) the Industrial and Commercial components – in particular, the inspection requirements of these components, (3) the requirement to inspect residential development; (4) the requirement to develop an enforcement program to maintain compliance with the Permit; (5) the Illicit Discharge and Illegal Connections Program; and (6) "other requirements imposed upon the Petitioner throughout the Permit." It is worth noting that the Petitioner does not cite or call upon specific examples of requirements that "specify the design, location, type of construction, or particular manner in which compliance may be had with that requirement." Rather, the Petitioner broadly generalizes that these requirements impose a specific manner of compliance without supporting evidence.

The Permit does not specify the manner of compliance as prohibited in CWC section 13360. As discussed in detail in the Fact Sheet/Technical Report[57] and the appended

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Section III.C further states "The permittees shall ensure that BMPs are implemented for entities discharging stormwater and urban runoff to stormwater conveyance systems within their area of jurisdiction." Section II.8 makes it clear that the Copermittees shall "Pursue enforcement actions as necessary to ensure compliance with the stormwater management programs and implementation plans." Section VI.A.2 directs the Copermittees to develop a DAMP that shall include "Proposed modifications to the existing BMPs and stormwater/urban runoff management programs to reduce pollutants in stormwater and urban runoff discharges **from industrial, commercial, and residential properties** to the maximum extent practicable." (emphasis added). AR 6.

[55] Section V.1 of Order No. 96-03 required that the DAMP developed in compliance with Order No. 90-38 is incorporated as an enforceable component of the Order. Specifically, sections II.2, II.6, II.9, III.1, V.1-2, V.11, and V.16 carry forward requirements established in Order No. 90-38. AR 6.

[56] Orange County NPDES Stormwater Program Drainage Areas Management Plan, April 1993, Executive Summary, sections 1.1, 2.2, 3.2, 4.3, 7.1, 7.2, 7.5, 5.0, 10.1, 10.2, 11.1, Appendices B, C, E, G, I, and J all contain references to prohibitions or required or recommended BMPs to reduce or prevent pollutants in discharges to the MS4. AR 60.

[57] Fact Sheet/Technical Report p. 31. AR 2.

Response to Comments Document,[58] the Permit provides a detailed framework for the development of BMP programs to reduce pollutants in discharges in urban runoff to the MEP.

With regard to the assertion that the SUSMP requirements violate CWC section 13360, this is another argument which has previously appeared before the SWRCB during the appeal of the Los Angeles SUSMP requirements and the San Diego MS4 Permit. The Permit's SUSMP requirements are essentially identical to those in the Los Angeles SUSMP and the San Diego Permit SUSMP requirements. Since the SWRCB upheld the Los Angeles SUSMP and the San Diego Permit and found these permits to be in compliance with Section 13360, the SWRCB must reach the same conclusion regarding the Orange County Permit's SUSMP requirements. Therefore, Petitioners appeal regarding this issue should be denied.

Regardless of whether this issue has been previously resolved by the SWRCB, it is clear that the Permit's SUSMP requirements are in compliance with Section 13360. The numeric sizing criteria requirement for priority development projects simply ensures that BMPs are adequately sized so as to be effective. The necessity for adequate sizing of BMPs is strongly supported in the administrative record.[59] As such, the numeric sizing criteria is a component of the MEP standard, no different than a requirement for annual inspections of a facility or site. The numeric sizing criteria establishes an objective measure to evaluate compliance with the statutory criterion of MEP contained in federal and state law. Thus, the numeric design criteria are similar to technology standards such as Best Available Technology (BAT), as it is applied to traditional point source discharges.

Furthermore, the numeric sizing criteria have broad technical reach and are not unique to any singular approach. Seven equivalent methods are provided to calculate the numeric sizing criteria. The choice of using either runoff volume or flow rate as the basis for numeric sizing criteria calculations is provided. In addition, the criteria are minimum standards, allowing the Copermittees to use stricter criteria. Also, the numeric sizing criteria does not dictate which BMPs out of the myriad of choices are to be used. This choice is left wholly to the Copermittee or project proponent. A requirement such as the numeric sizing criteria requirement, which allows for a seemingly infinite number of ways to achieve compliance, does not "specify the design, location, type of construction, or particular manner of compliance." Finally, the SWRCB has found that there is no violation of Section 13360 if an order allows a discharger to select from a number of permissible alternatives for achieving compliance with a standard.[60]

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[58] Fact Sheet/Technical Report Attachment 6 pp. 33-36, Response to comments submitted by Richard Watson & Associates, Laguna Niguel, Mission Viejo, Aliso Viejo, Dana Point, County of Orange, Construction Industry Coalition on Water Quality, Lake Forest, Laguna Woods. AR 2.

[59] SDRWQCB, 2000. Staff Report for Standard Urban Storm Water Mitigation Plans and Numerical Sizing Criteria for Best Management Practices. Pg. 1-8. AR 67.

[60] SWRCB, 1990. SWRCB Order No. 90-5. Finds that Cease and Desist Order did not violate Section 13360 because it allowed the dischargers to select the manner of compliance from permissible alternatives specified in the Order. AR 68.

With respect to the requirements to implement BMPs and inspect industrial and commercial facilities, the SDRWQCB will address this issue below. It should be noted, however, that previous permits required site-specific implementation of BMPs for these facilities as well as a mechanism to ensure compliance with local ordinances[61]. Similarly, both an enforcement program[62] and a program to identify and eliminate illicit discharges and illegal connections[63] were requirements of previous permits. As with the SUSMP requirements, the Permit requires implementation of BMP programs to reduce pollutants in urban runoff discharges to the MEP, but leaves the determination of specific BMPs, their location, type of construction, and particular manner of implementation to the discretion of the Copermittees.

With regard to the Petitioner's appeal of the requirement to inspect residential areas, the Petitioner misunderstands or misstates the Permit's requirements. The Permit does not call for inspection of residential areas, but rather, it requires implementation of pollution prevention BMPs, identification of high priority residential areas, implementation of designated BMPs, and enforcement of local ordinances as necessary. The Permit leaves to the Copermittees discretion the manner of compliance with these general directives.

As adopted by the RWQCBs, the municipal storm water permits represent the framework of minimum requirements issued pursuant to the Clean Water Act and Federal NPDES Regulations to be implemented by the Permittees to achieve the Maximum Extent Practicable standard and ensure that urban runoff discharges do not cause or contribute to exceedances of water quality objectives. Within that framework, the Permittees have significant opportunity and flexibility to develop and implement effective programs and to improve and modify these programs as necessary to achieve and maintain compliance with the permits and receiving water quality objectives.

CWA section 402(p)(3)(B)(iii) provides that municipal storm water permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." To meet this requirement of the CWA, the municipal storm water permit requires the implementation of BMPs, as required

[61] Order No. 90-38 section VI.A.3.a required "Implementation of site-specific BMPs which are required to reduce pollutants in the stormwater discharges from residential, commercial, and industrial areas, and construction sites." Order No. 96-03 section V.11.a further required that the Copermittees shall implement "A mechanism to determine compliance of industrial facilities, commercial facilities, and construction sites with storm water ordinances and concerns;" AR 5.

[62] Order No. 90-38 section II.A.8 required the Copermittees to "Pursue enforcement actions as necessary to ensure compliance with the stormwater management program and the implementation plans" Order No. 96-03 section further required that the Copermittees "shall implement the Enforcement Consistency Guide dated 8/15/94 or an equivalent enforcement strategy in order to enforce the Water Quality Ordinance." AR 5.

[63] Order No. 90-38 section V required the development and implementation of a reconnaissance survey manual to identify illicit discharges, illegal connections and "other practices which impair water quality as a result of stormwater/urban runoff discharges to receiving waters." Order No. 96-03 further required implementation of section 10 of the DAMP (Detection/Elimination of Illegal Discharges and Illicit Connections" AR 5.

under Federal NPDES Regulation 40 CFR 122.44(k). The permit specifies programs to be developed and implemented by the Copermittees in order to carry out the CWA requirements. Any specified programs in the permit are made all the more necessary by the exclusion of numeric effluent limits from the permit. Reliance on BMPs as opposed to numerical effluent limits requires specification of those programs that are relied upon to reduce pollution. Further, the US EPA supports the approach of increasingly detailed storm water permits, stating "The interim permitting approach uses best management practices (BMPs) in first-round storm water permits, and expanded or better-tailored BMPs in subsequent permits, where necessary, to provide for the attainment of water quality standards"[64]

While the permit includes detailed standards for widespread BMP implementation, it does not require use of any particular BMPs nor does it specify design, construction, brand, vendor, or location of application. The framework of requirements and standards contained in the permits are sufficiently broad and inclusive to provide the Permittees with a significant degree of latitude to exercise their ingenuity, creativity, and local expertise in developing and implementing BMP programs. The SDRWQCB's municipal storm water permit approach actually encourages implementation of combinations of BMPs, and does not preclude any particular BMPs or other means of compliance. Permits that allow for seemingly infinite means for achieving compliance do not specify the design or manner of compliance in violation of CWC section 13360.

Moreover, the Permittees are required to evaluate the effectiveness of their programs and to revise the programs as necessary to comply with the permits and receiving water quality objectives. The RWQCBs themselves must be able to evaluate the effectiveness of these programs. Without increasingly detailed permits that recognize that the complexity of storm water management requires increasingly complex and integrative programs, the programs developed by the Permittees may not achieve the MEP standard identified by the RWQCBs or protect the beneficial uses of the receiving waters from the deleterious impact of polluted urban runoff discharges.

Because the Permit does not in fact specify the manner of compliance with its directives with regard to design, location, type of construction or particular manner of compliance, the Petitioner's appeal of these requirements in this matter should be dismissed.

F. THE SDRWQCB HAS NOT ABUSED IT'S DISCRETION OR EXCEEDED ITS LEGAL AUTHORITY BY REQUIRING PERMITTEES TO INSPECT AND ENFORCE LOCAL ORDINANCES AT CONSTRUCTION, INDUSTRIAL, AND COMMERCIAL SITES EVEN IF THEY ARE AUTHORIZED UNDER STATE-ISSUED PERMITS.

The Petitioner's challenge of Permit requirements related to construction, industrial, and commercial sites and facilities found in sections VIII and XI of the petition is flawed,

[64] U.S. Environmental Protection Agency 1996. Interim Permitting Approach for Water Quality Based Effluent Limitations in Storm Water Permits. 61 Federal Register 57425. AR 25.

factually incorrect, and does not acknowledge that these requirements generally applied under both previous permits and the DAMP.

1. Requirements For The Copermittees To Implement BMPs and Inspect Construction and Industrial Facilities For Compliance with The Orange County Water Quality Ordinance Are Lawful and Must Be Included in the Jurisdictional Urban Runoff Management Program.

The federal regulations for municipal storm water permits contain many references that support the central role of construction, industrial, and commercial inspections by the Copermittees. Regarding municipal inspections of construction sites, Federal NPDES Regulations at 40 CFR 122.26(d)(2)(iv)(D)(3) provides that municipal storm water programs include "A description of procedures for identifying priorities for **inspecting** sites and enforcing control measures which consider the nature of the construction activity, topography, and the characteristics of soils and receiving water quality" (emphasis added). This is further supported with respect to industrial facilities in the Preamble to the Federal NPDES Regulations in which the US EPA states:

> *"…EPA still believes that municipal operators of large and medium municipal systems have an important role in source identification and the development of pollutant controls for industries that discharge storm water through municipal separate storm sewer systems is appropriate. …Because storm water from industrial facilities may be a major contributor of pollutants to municipal separate storm sewer systems, municipalities are obligated to develop controls for storm water discharges associated with industrial activity through their system in their storm water management program…EPA believes that the permitting of municipal separate storm sewer systems and the industrial discharges through them will act in a complimentary manner to fully control the pollutants in those sewer systems."*[65]

The US EPA further addressed this issue clearly in the Preamble to the Federal NPDES Regulations in the statement that "Dischargers of storm water associated with industrial activity through municipal separate storm sewer systems will be subject to municipal programs that address such discharges as well as to an individual or general NPDES permit for those discharges."[66] Numerous other references in the Preamble support these select statements regarding municipal responsibility to control the discharge of pollutants from construction and industrial sites and facilities to the MS4.[67]

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[65] US EPA 1990 Preamble to National Pollution Discharge Elimination System Permit Application Regulations for Storm Water Discharges. Federal Register Vol. 55 No. 222 at p. 48000 AR 65.

[66] US EPA 1990 Preamble to National Pollution Discharge Elimination System Permit Application Regulations for Storm Water Discharges. Federal Register Vol. 55 No. 222 at p. 48058. AR 65.

[67] See for example references at 4800, 48001, 4802, 4806, 48035, 48038, 48052, 48053, 48054, 48055, 48056, 48057 contained in US EPA 1990 Preamble to National Pollution Discharge Elimination System

For industrial sites, the regulations require that a Copermittee "monitor and control" pollutants in storm water discharges to the MS4 (see 40 CFR 122.26 (d)(2)(iv)(C)) to meet the maximum extent practicable (MEP) standard. The regulations at 40 CFR 122.26 (d)(2)(iv)(C)(1) also state that operators of "MS4s are required to identify priorities and procedures for **inspections**" for industrial facilities that they determine are contributing substantial pollutant loadings to the MS4" (emphasis added). Moreover, US EPA finds that "Site **inspections** are expected to be the primary enforcement mechanism by which erosion and sediment controls are maintained" (emphasis added).[68] This "monitor and control" requirement for the Copermittees can only be fulfilled through an adequate inspection program of facilities that are likely to contribute pollutants to storm water runoff. Indeed, even the effort to prioritize facilities based on their threat to yield polluted storm water runoff would be very difficult to accomplish without inspection of those facilities.

Also, the regulations requiring that municipalities gain adequate legal authority also support the importance of inspections by municipalities. Federal regulations at 40 CFR 122.26(d)(2)(i) require "[a] demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to: (A) Control through ordinance, permit, contract, order or similar means, the contribution of pollutants to the municipal storm sewer by storm water discharges associated with **industrial** activity and the quality of storm water discharged from sites of industrial activity; […] (F) Carry out all **inspection**, surveillance and monitoring procedures necessary to determine compliance and noncompliance with permit conditions including the prohibition on illicit discharges to the municipal separate storm sewer" (emphasis added). The Petitioner asserts that the Federal NPDES Regulations did not intend for the Copermittees to address all industrial facilities discharging to their MS4s. The preamble to the Federal NPDES Regulations and the subsequent guidance cited below belie this interpretation. In the preamble, the US EPA states:

> *"The permit application requirements in today's rule require the applicant or co-applicants to develop management programs for four types of pollutant sources which discharge to large and medium municipal storm sewer systems are usually expected to be composed of: (1) Runoff from commercial and residential areas; (2) storm water runoff from **industrial areas**; (3) runoff from **construction sites**; and (4) non-storm water discharges."* (Emphasis added)[69]

Permit Application Regulations for Storm Water Discharges. Federal Register Vol. 55 No. 222 at p. 48058. AR 65.

[68] U.S. Environmental Protection Agency. 1992. Guidance Manual for the Preparation of Part II of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems. Washington D.C. EPA 833-B-92-002. AR 27.

[69] US EPA 1990 Preamble to National Pollution Discharge Elimination System Permit Application Regulations for Storm Water Discharges. Federal Register Vol. 55 No. 222. AR 65.

The language in the preamble and at 40 CFR 122.26(d)(2)(iv)(C) does not preclude the SDRWQCB from including the requirements in its MS4 permits. Moreover, as discussed in the Fact Sheet/Technical Report, the SDRWQCB has authority under the Clean Water Act[70] to require more than the minimum requirements specified in the Federal NPDES Regulations, which themselves provide additional flexibility to the SDRWQCB to require additional measures it determines necessary.[71] The US EPA spoke even more directly to the issue of compliance inspections of industrial facilities in its guidance for the preparation of Part 2 of the NPDES Permit Applications for discharges from Municipal Separate Storm Sewer Systems (MS4s)[72] when they stated:

> *"The municipality is ultimately responsible for discharges from their MS4. Consequently, the proposed management program should describe how the municipality will help EPA and authorized NPDES States:*
>
> - *Identify priority industries discharging to the systems;*
> - *Review and evaluate storm water pollution prevention plans and other procedures that industrial facilities must develop under general or individual permits;*
> - *Establish and implement BMPs to reduce pollutants from these industrial facilities (or require industry to implement them; and*
> - ***Inspect and monitor industrial facilities to verify that industries discharging storm water to the municipal systems are in compliance with their NPDES storm water permit, if required**."*

The US EPA similarly addressed construction sites in the aforementioned document when they stated:

> *"As specified in §122.26(d)(2)(iv)(D), applicants must describe proposed regulatory programs to reduce pollutants in storm water runoff from construction sites to the MS4. This part of the proposed management*

[70] The Clean Water Act requires in section 402(p)(3)(B)(iii) that permits for discharges from municipal storm sewers "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." AR 24.

[71] Federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B,C,E, and F) provide that each Copermittee's permit application "shall consist of : (i) Adequate legal authority. A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to: […] (B) Prohibit through ordinance, order or similar means, illicit discharges to the municipal separate storm sewer; (C) Control through ordinance, order or similar means the discharge to a municipal separate storm sewer of spills, dumping or disposal of materials other than storm water; […] (E) Require compliance with condition in ordinances, permits, contracts or orders; and (F) Carry out **all inspection, surveillance and monitoring procedures necessary to determine compliance and noncompliance with permit conditions** including the prohibition on illicit discharges to the municipal separate storm sewer" (emphasis added). AR 23.

[72] US EPA 1992 Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharge from Municipal Separate Storm Sewer Systems p. 6-17. AR 27.

program must address:

- *Implementation of BMPs;*
- *Procedures for reviewing site plans to ensure that they are consistent with local sediment and erosion control plans;*
- ***Inspections of construction sites**; and*
- *Enforcement measures and educational activities for construction site developers and operators"* (Emphasis added)[73]

Finally, the Petitioner is incorrect in stating that the CWC does not provide the SDRWQCB with the authority to require BMPs and inspections to ensure compliance with local ordinances. The CWC at section 13377 provides that "Notwithstanding any other provision of this division, the state board or the regional boards shall, as required or authorized by the Federal Water Pollution Control Act (Clean Water Act), as amended, issue waste discharge requirements and dredged or fill material permits which apply and ensure compliance with all applicable provisions of the act and acts amendatory thereof or supplementary, thereto**, together with anymore stringent effluent standards or limitation necessary to implement water quality control plans**, or for the protection of beneficial uses, or to prevent nuisance" (emphasis added). The SDRWQCB has demonstrated that more specific limitations in the form of mandatory minimum inspections of high priority construction sites and industrial facilities are necessary to implement its Basin Plan in southern Orange County.[74]

Thus, for all the foregoing reasons, the Permit requirements for inspection and enforcement of local ordinances, including the Orange County Water Quality Ordinance, are within the legal authority provided the SDRWQCB under existing state and federal law and are consistent with the US EPA's guidance and direction. The Petitioner's contentions on this point are without merit and should be denied.

2. Previous Permits And The DAMP Required BMP Implementation, Inspection And Enforcement Of Construction And Industrial Sites And Facilities.

Consistent with the aforementioned legal authorities and US EPA guidance, both previous permits and the DAMP incorporate requirements for the Copermittees to supervise, implement BMPs to control discharge of pollutants, inspect, and enforce local ordinances at construction and industrial sites and facilities.

[73] US EPA 1992 Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharge from Municipal Separate Storm Sewer Systems p. 6-11. AR 27.

[74] The need for more stringent BMP programs is generally addressed in Findings 3, 4, 5, 6, 7, 9, 12, 16, 17, 19, 20, 21, 22, 23, and 24. In particular, Findings 21, 22, and 24 directly address the need for inspections and dual regulation of industrial facilities and construction sites. In addition, the Fact Sheet/Technical Report provides detailed discussion of need for municipal inspection and enforcement of industrial facilities and construction sites and the Permit requirements for dual regulation of these activities in section IV at pp. 21-24; section V at pp. 29-31 and pp. 35-38; section VI at pp. 47-53, pp. 55, 58-65, 88-90, 93-94, 122-123, 125-130, 145-146, 149-153. AR 1.

a. Previous Permits Included Similar Provisions

Order No. 90-38, issued by the SDRWQCB in advance of the promulgation of the Federal NPDES Regulations, required the Copermittees to develop the Drainage Area Management Plan (DAMP). At a minimum, the Permit required that the DAMP include "Implementation of site-specific BMPs which are required to reduce pollutants in the stormwater discharges from residential, commercial, and industrial areas, and construction sites."[75] Order No. 90-38 further required that the Copermittees prepare a "listing of large industrial facilities (with more than 100 employees) where hazardous/toxic substances are stored and/or used, landfills, hazardous waste disposal, treatment, and/or recovery facilities, and any known spills, leaks or other problems in the area."[76] More to the point, Finding 8, citing a draft Implementation Agreement[77], specifically found that "The co-permittees **will develop site-specific compliance requirements, perform compliance monitoring and inspections**, submit storm drain maps and compliance reports to the County of Orange, and **demonstrate and exercise enforcement authority for achieving compliance with the terms and conditions of this Order**" (emphasis added)[78]. The Petitioner was a signatory party to the draft Implementation Agreement cited in the Finding and in thereby agreed that "The terms of **all applicable Federal and State guidelines, as presently written or as changed during the life of this agreement** are hereby incorporated by reference and made a part of this agreement and take precedence over any inconsistent terms of this agreement" (emphasis added). The life of the agreement was stated to be "indefinite or as long as the WQA [Water Quality Act] mandates compliance" and was stated to be applicable to the signatory parties until they withdrew from the agreement. The City of Mission Viejo has not withdrawn from the Implementation Agreement and remains a signatory party. In addition, Finding 9 of Order No. 90-38 stated "This Order requires the permittees to develop and implement programs to ensure that entities discharging stormwater/urban runoff **into** stormwater conveyance systems take steps to control/reduce discharges of pollutants to waters of the united States" (emphasis added)[79]

Order No. 96-03 further required that the Copermittees shall implement "A mechanism to determine compliance of **industrial facilities**, **commercial facilities, and construction sites with storm water ordinances and concerns**;"[80] Furthermore, Finding 29 of that order stated "The County of Orange already requires a Water Quality Management Plan which addresses permanent post-construction BMPs, in addition to the SWPPP required by the statewide general permit for construction activity." In Order No. 96-03 the SDRWQCB specifically spoke to the need for increased Copermittee control of construction sites in its requirement that "The permittees shall not issue any grading permit for construction activities which will disturb five acres or more…until proof of coverage with the State's General Construction Activity Storm Water Permit is

[75] Order No. 90-38 section VI.A.3.a. AR 5.
[76] Order No. 90-38 section V.A.3.d. AR 5.
[77] National Pollution Discharge Elimination System Storm Water Permit Application Implementation Agreement May 8, 1990 Draft (Appendix C) AR 17.
[78] Order No. 90-38 p. 3, Finding 8. AR 5.
[79] Order No. 90-38 Finding 9. AR 5.
[80] Order No. 96-03 section V.11.a. AR 6.

verified."[81] Furthermore, Order No. 96-03 required that "The permittees will continue to provide notification to the Regional Board regarding storm water related information gathered during site inspections of industrial and construction sites regulated by the Statewide General Storm Water Permits."[82] That permit further required that "The Permittees shall develop a training program and offer it to the staff of existing industrial and construction inspection programs, to increase compliance with storm water requirements."[83] Finally, the permit also required "A mechanism to determine compliance of **industrial facilities**, **commercial facilities, and construction sites with storm water ordinances and concerns**…**A program to monitor and control the pollutants in storm water discharges from industrial facilities to the municipal system** that the permittees determine are contributing substantial pollutant loading to the municipal storm drain system. **The program shall identify priorities and procedures for inspections and for establishing and implementing control measures**" (emphasis added).[84]

b. The DAMP Included Similar Provisions.

The 1993 DAMP, which was referenced as an enforceable component of Order No. 96-03, included provisions (not challenged at that time by the Petitioner) similar to those more specifically detailed in the Permit. Developed and revised to implement the requirements of the two previous permits, the DAMP includes specific recognition of the requirements for municipal inspection and BMP implementation at construction and industrial facilities and sites. DAMP Section 3.2 states "The DAMP elements fall into two general categories": prevention of pollutant introduction into the drainage system and removal of pollutants from the drainage system. The prevention-oriented elements include identification and elimination of illegal discharges, **continued supervision of permitted industrial discharges**…" DAMP section 4.3 notes that "The Orange County Water Pollution Ordinance **regulates discharges associated with industrial activity** by prohibiting the dumping or discharge of 'industrial waste' by any individual in a manner that 'will or may cause or result in the pollution of any underground or surface waters… The County has the **authority to enforce and to administer the provisions contained in the ordinance, including the authority to inspect any violation.**" The DAMP even more specifically observes in Section 8.1 that "Federal regulations require a program to implement and maintain BMPs to reduce pollutants in storm water runoff from construction sites… "Specific components of the [storm water] program are to include… a **description of procedures for identifying priorities for inspecting sites and enforcing control measures**…"

The Construction section of the DAMP requires in Section 8.2 that "Construction activities disturbing five acres or more of land **will <u>also</u> be required to comply** with a general Construction NPDES Storm Water Permit from the SWRCB." Section 8.4 of the

[81] Order No. 96-03 section V.6. AR 6.
[82] Order No. 96-03 section V.13. AR 6.
[83] Order No. 96-03 section V.12. AR 6.
[84] Order No. 96-03 section V.11.a and V.11.b. AR 6.

DAMP directly contradicts the Petitioner's own statements and assertions in its Petition and Stay Requests by revealing that the Copermittees in implementing the DAMP were required to "…**enforce grading codes** on private construction practices…These codes will be evaluated and revised as needed in the Third Term Permit period to **ensure consistency with other regulatory documents such as the (General Statewide) Construction Permit and (Orange County) Water Quality Ordinance**" (emphasis added).[85] Moreover, the same DAMP section specifically identifies "Inspection program elements specifically addressing stormwater pollution include**: Inspection at the beginning of construction to verify that required nonstructural or structural stormwater pollution control measures are in place; Inspection during storm events; Inspection shortly before notice of termination is filed**." From these construction program elements from the DAMP, which the Petitioner describes as "evolving" and implementing "proven" BMPs, it is difficult to reconcile the Petitioners contentions regarding the Permit with provisions and requirements of their own programs. The Petitioner alleges in its Stay Request that they need time to "develop" a construction program and that they lack the resources and legal authority to implement the program.[86] From these statements, the SDRWQCB can only conclude that either the City failed to meet the second-term permit requirements for a construction program or now intends to budget money to develop another one based on a template provided by the County.

Thus, although the Petitioner leaves in doubt its compliance with previous permit requirements and the DAMP, both establish that the need for inspections of construction and industrial facilities was at least a conceptual component of the storm water management approach in southern Orange County prior to the adoption of the Permit. More tellingly, the Petitioner, an original Copermittee under Order No. 90-38 and participant in the development of the DAMP, has not previously challenged these provisions and apparently consented to their incorporation in the DAMP.

c. The Orange County Water Quality Ordinance Adopted By The Petitioner Is Supportive Of The Permit Requirements And Belies The Petitioner's Contentions.

It is interesting to note that while the Petitioner challenges the Permit requirements and questions its own legal authority to perform inspections and enforce local ordinances at construction sites and industrial facilities, the Orange County Water Quality Ordinance (Ordinance) adopted by the Petitioner includes specific enforceable language to the contrary. The Ordinance Recitals include the following statement:

> *Whereas the Orange County Flood Control District is authorized by Water Code – Appendix (West) §§ 36-2(17) and (18)* ***to (i) regulate, prohibit or control the discharge of pollutants, waste, or any other material into the Orange County Flood Control District Facilities*** *by*

[85] 2000 DAMP 2000 section 8.4. AR 17.

[86] Petitioner, the City of Mission Viejo's Further Points and Authorities and Evidence Supporting Request for Stay (NPDES Permit No. CAS004001) Declaration of Dennis Wilberg in Support Therof p. 2, 3, 9, 10, Supporting Declaration of Dennis Wilberg at p. 2-3; Exhibit In Support of Request for Stay "County of Orange Public Facilities &Resources Department NPDES Stormwater Management Program, Final Proposed Shared Costs Budget for Fiscal Year 2002-2003 April 2002 p. 2.

> *requiring dischargers to obtain a permit from the district prior to any discharge and by prohibiting the discharge of any material, which does or may cause a nuisance, and (ii**) establish compliance with any federal state, or local law, order, regulation or rule relating to water pollution or the discharge of pollutants, waste, or other material** and **(iii) exercise a right to enter any premises at which a water pollution, waste, or contamination source is located for the purpose of inspecting the source, securing samples of discharges and inspection of records required to be maintained by federal, state, or local laws, orders, regulations and rules.**"* (Emphasis added).[87]

The Ordinance also states:

> *Whereas the Orange County Flood Control District is further authorized by Water Code Appendix (West) §36-2.5 to adopt and enforce regulations within the incorporated and the unincorporated areas of the district to (i) **eliminate the pollution, waste and contamination of waters flowing into, through, from, originating within watercourses and impoundments, both natural and artificial, and (ii) to prevent contamination, nuisance, pollution or activities otherwise capable of rendering unfit for beneficial use the surface or subsurface water used or useful within the district and (iii) to abate as a public nuisance the violation of any district regulation**, assessing the full costs of such abatement to the violator."* (Emphasis added).[88]

In addition, the Ordinance finds that the benefits to be realized from enforcement of the Ordinance include:

> *"…a reduction in storm water borne pollution will promote the public health and protect the general welfare of the locality by reducing the level of artificial and naturally occurring constituents, which may improve the quality of the waters in this region*"[89]

Section II paragraphs 5-19 confers upon the Petitioner, which adopted the Ordinance, the legal authority to execute the provisions of the Ordinance.[90] In particular, paragraphs 12-19 directly contradict the Petitioner's assertions and bear directly upon (1) the Petitioner's role and responsibilities resulting from its authorization of the activities; (2) the Petitioner's requirement of compliance by **construction site and industrial facility**

[87] 2000 DAMP Appendix E.1 Orange County Water Quality Ordinance section II paragraph 2 at p. E1-2. AR 17.
[88] 2000 DAMP Appendix E.1 Orange County Water Quality Ordinance section II paragraph 3 at p. E1-2. AR 17.
[89] 2000 DAMP Appendix E.1 Orange County Water Quality Ordinance section II paragraph 5 at P. E1-2. AR 17.
[90] 2000 DAMP section 4.3 "Authority to Control Pollutant Discharges" at p. 24 states that "All of the Permittees adopted the Water Quality Ordinance and corresponding Enforcement Consistency Guide and provided certifications regarding this to the Regional Boards in Fiscal Year 1997-1998." AR 17.

dischargers with the lawful requirements of the City; and (3) the power of the City and the Orange County Flood Control District (District) to control discharges **into the storm water facilities and other watercourses** within the City through the evaluation and amendment of Storm Water Pollution Prevention Plans, monitoring plans and "information and records necessary to determine compliance with the State General Permits."[91] Finally, paragraph 19 specifically empowers the City, County of Orange, and District to:

> *"(i)* ***enter upon the dischargers premises where a regulated facility is located*** *or where records must be kept under the conditions of the State General Permits, (ii) access and copy, at reasonable times, any records that must be kept under the conditions of the State General Permits, (iii)* ***inspect, at reasonable times, any facility or equipment related to or impacting storm water discharge****, and (iv)* ***sample or monitoring for the purpose of ensuring compliance with the State General Permits****."* (Emphasis added)[92]

The Ordinance specifically addresses the requirements for construction site compliance. The Ordinance also states that a "Pollutant" includes "Waste materials and wastewater generated on construction sites and by construction activities…"[93] It further states that "Prohibited Discharge shall mean any Discharge which contains any pollutant from public or private property **to** (i) the Storm Drainage System; (ii) any upstream flow, which is tributary to the Storm Drainage System; (iii) any groundwater, river, stream, creek, wash, or dry weather arroyo, wetlands areas, marsh, coastal slough, or (iv) any coastal harbor, bay, or Pacific Ocean" (emphasis added).[94] This definition clearly empowers the City to prohibit discharges of pollutants to not only the MS4, but natural watercourses as well. More to the point, section V.1.a of the Ordinance specifically directs the adopting City to ensure that "All New Development and Significant Redevelopment within the City…shall be undertaken in accordance with: (i) The DAMP, including but not limited to the Development Project Guidance; and (ii) Any conditions and requirements established by the planning agency…which are reasonably related to the reduction or elimination of Pollutants in storm water runoff from the project site."[95] The Ordinance further adds the responsibility to the City to "review the project plans and impose terms, conditions, and requirements on the project in accordance with Section V.A.1."[96] As previously noted, the Ordinance confers upon the adopting City the "Right to Inspect," "Entry to Inspect," and right to perform "Compliance Assessments."

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[91] 2000 DAMP Appendix E.1 Orange County Water Quality Ordinance section II paragraphs 12-19 at pp. E1-3 to E1-5. AR 17.
[92] 2000 DAMP Appendix E.1 Orange County Water Quality Ordinance section II paragraph 19 at p. E1-5. AR 17.
[93] 2000 DAMP Appendix E.1 Orange County Water Quality Ordinance section III parts S.7 at p. E1-9. AR 17.
[94] 2000 DAMP Appendix E.1 Orange County Water Quality Ordinance section III parts S and T at pp. E1-9 to E1-10. AR 17.
[95] 2000 DAMP Appendix E.1 Orange County Water Quality Ordinance section V.A.1.ii-iii at p. E1-12. AR 17.
[96] 2000 DAMP Appendix E.1 Orange County Water Quality Ordinance section V.A.2 at pp. E1-12 to E1-13. AR 17.

These powers are specified at section VI.1-8.[97] Sections VII provides mechanisms and sanctions for enforcement of the Ordinance and recovery of costs.[98] It is clear that the Ordinance was drafted to provide the adopting parties, including the Petitioner, with sufficient legal authority to control discharges from these areas and activities to their MS4s and other watercourses pursuant to their local land use authorities. [99]

Additionally, the Enforcement Consistency Guide, adopted by the Petitioner, includes specific guidance for the inspection and enforcement at industrial facilities as well as construction sites, commercial, and residential activities.[100] In particular, the Enforcement Consistency Guide observes that "certain requirements of the State General Permits…are reviewable under the specific terms of those permits by local program personnel. Accordingly, the Ordinance provides that Authorized Inspectors may request and review State General Permit program documentation when conducting site investigations and as necessary to assist in local program enforcement."[101] While Enforcement Consistency Guide clearly and correctly identifies the enforcement responsibility for the general permits lay with the SDRWQCB, it just as clearly asserts responsibility for Authorized Inspectors to enforce local ordinances (i.e. Orange County Water Quality Ordinance).

These provisions of the Orange County Water Quality Ordinance and Enforcement Consistency Guide, adopted by the Petitioner, dispose of all of the arguments presented by the Petitioner with respect to the dual regulation of construction sites and industrial facilities subject to the general statewide permits. It is clear from their own Ordinance and Enforcement Consistency Guide and other provisions of the DAMP that the SDRWQCB is requiring inspections or implementation of controls that are consistent with previous programs. It is also noteworthy that both documents further include many references to controlling the contribution of pollutants **to the MS4 system** as well as other watercourses within the jurisdiction of the adopting City; contradicting arguments the Petitioner has raised elsewhere in its Petition. As evidenced in the previous permits, in the DAMP, and in the Ordinance and Enforcement Consistency Guide adopted by the Petitioner, dual regulation of construction sites and industrial facilities is lawful, has been required for nearly ten years, and has been a common expectation on the part of the Copermittees themselves.

[97] 2000 DAMP Appendix E.1 Orange County Water Quality Ordinance section VI at p. E1-15. AR 17.
[98] 2000 DAMP Appendix E.1 Orange County Water Quality Ordinance section VII at pp. E1-17- E1-26. AR 17.
[99] 2000 DAMP Appendix E.1 Orange County Water Quality Ordinance section III parts Q, T, and V at p. E1-10. AR 17.
[100] 2000 DAMP Appendix E.2 Enforcement Consistency Guide at pp. E2-2, E2-7, and E2-12 to E2-20. AR 17.
[101] 2000 DAMP Appendix E.2 Enforcement Consistency Guide section III.E.3.b at p. 7. AR 17.

3. In Requiring The Copermittees To Implement And Enforce Their Own Orange County Water Quality Ordinance, The SDRWQCB Does Not Delegate Or Abrogate Its Own Responsibility To Enforce General Statewide Permits.

The Petitioner contends that the responsibility to inspect and assess compliance of facilities authorized under general statewide permits lay exclusively with the SDRWQCB and that the legal authority of the SDRWQCB does not provide for the delegation of those duties to the Copermittees. The Petitioner, however, fails to acknowledge that the Administrative Record is replete with statements from the SDRWQCB that it does not intend to delegate the inspection, assessment of compliance, and enforcement of the statewide general permits and that it requires only that the Copermittees enforce their **own local ordinances** (e.g. Orange County Water Quality Ordinance).[102] Since the Copermittees are required to conduct inspections and ensure compliance with their own local ordinances, they are not required to administer NPDES permits nor assess compliance of facilities permitted under statewide permits or federal NPDES permits. Similarly, the Petitioner's claim that they cannot have "statewide jurisdiction" over any activities or dischargers is also moot. Consistent with the SWRCB Orders 97-03 DWQ and 99-08 DWQ, the SDRWQCB has repeatedly stated that it will continue to conduct inspections, assess compliance, and take appropriate enforcement action at facilities subject to the statewide general construction or industrial permits. Recent enforcement actions by the SDRWQCB have demonstrated its resolve in this matter.[103] Moreover, the SDRWQCB included language in the Permit that relieves the Copermittees of responsibility for inspecting a high priority Industrial facility that it has inspected that year.[104] However, the Copermittees also possess, under the Federal NPDES Regulations implemented under the Permit, a responsibility to inspect, implement or require the implementation of BMPs to control discharges of pollutants to their MS4s, and ensure compliance of the facilities with the water quality and grading ordinances they adopted, as well as with the permits they issued to these businesses. As discussed above, the Petitioner has consistently failed to note the repeated references in the Federal NPDES Regulations of Permittee responsibility to conduct inspections of and control discharges from construction and industrial facilities. More to the point, the Petitioner demonstrates a lack of knowledge of the previous repeated acknowledgements in its own Drainage

[102] Order No. 96-03 Finding 16; Order No. R9-2002-0001: Finding 22 pp. 4-5; Fact Sheet/Technical Report pp. 36-38 and pp. 63-64, Fact Sheet/Technical Report Attachment 6 (Response to Comments Document) pp. 103-104; staff presentation by Jeremy Haas at July 19, 2001 and August 8, 2001 workshops; and staff presentation by David Gibson at January 9, 2002 California Regional Water Quality Control Board, San Diego Region Public Hearing on Tentative Order R9-2002-0001. AR 6. AR 1. AR 2. AR 32. AR 56. AR 57.

[103] SDRWQCB ACL Order No. ACL Order No. R9-2001-0027 for $100,003 adopted on 12 December 2001 for violations of the Statewide General Construction Storm Water Permit; SDRWQCB ACL Order No. R9-2002-0007 for $103,497 adopted on 09 January 2002 for violations of the Statewide General Construction Storm Water Permit; and SDRWQCB ACL Order No. R9-2002-0027 for $422,200 adopted on 13 February 2002 for violations of the Statewide General Construction Storm Water Permit.

[104] Order No. R9-2002-0001 section F.3.b.(6).d "To the extent that the SDRWQCB has conducted an inspection of a high priority industrial site during a particular year, the requirement for the responsible Copermittee to inspect this site during the same year will be satisfied." AR 1.

Area Management Plan[105] of these responsibilities discussed previously and reiterated below. [106, 107] Furthermore, the Copermittees are not required to evaluate Storm Water Pollution Prevention Plans beyond **compliance with their ordinances** and then only in cases in which they determine to establish a monthly wet season inspection frequency for a particular high priority construction site or a biannual inspection frequency for a particular industrial facility. This point is reiterated at multiple points in the Enforcement Consistency Guide, which, together with the Orange County Water Quality Ordinance, the Petitioner has adopted.[108] With respect to the contention that the Copermittees should not be required to notify the SDRWQCB of potential violations at these facilities, this has been a minimum requirement of both previous permits.[109] Contrary to the Petitioner's

[105] The 1993 version of the DAMP was made an enforceable component of Order No. 96-03 and hence is quoted below in the context of permitted requirements implemented under the DAMP. In September 2000, a revised copy of the DAMP (2000 DAMP) was submitted that carried forward the basic requirements of the 1993 DAMP together with second term permit program improvements, but omitted much of the supporting regulatory language. AR 60.

[106] 1993 DAMP Sec. 3.1: "**EPA regulations require** that storm water quality management plans include programs that address four types of pollutant sources (1) **Runoff from commercial and residential areas; (2) Runoff from industrial sites (3) Runoff from construction sites**; and (4) Non-storm water discharges;"

1993 DAMP Sec. 3.2: "The DAMP elements fall into two general categories" prevention of pollutant introduction into the drainage system and removal of pollutants from the drainage system. The prevention-oriented elements include identification and elimination of illegal discharges, **continued supervision of permitted industrial discharges**…"

1993 DAMP Sec. 4.3: The Orange County Water Pollution Ordinance **regulates discharges associated with industrial activity** by prohibiting the dumping or discharge of 'industrial waste' by any individual in a manner that 'will or may cause or result in the pollution of any underground or surface waters…'… The County has the **authority to enforce and to administer the provisions contained in the ordinance, including the authority to inspect any violation.**"

1993 DAMP Section 8.1: Federal regulations require a program to implement and maintain BMPs to reduce pollutants in storm water runoff from construction sites… "Specific components of the [storm water] program are to include… a **description of procedures for identifying priorities for inspecting sites and enforcing control measures**…"

1993 DAMP Section. 8.2: "Construction activities disturbing five acres or more of land **will also be required to comply** with a general Construction NPDES Storm Water Permit from the SWRCB."

1993 DAMP Section 8.7 and 2000 DAMP Section 8.4: "Permittee oversight of Private Construction Practices…**Inspection program elements specifically addressing stormwater pollution will include:**

- Inspection at the beginning of construction to verify that required nonstructural or structural stormwater pollution control measures are in place.

- Inspection during storm event; and.

- Inspection shortly before notice of completion is filed." AR 60.

[107] See also 1993 DAMP Appendix E Section 3.3: "Since issuance of Orange County's 'early' NPDES permit, EPA rules and regulations were promulgated (Federal Register November 16, 1990 Rules and Regulations, page 48069). **These will likely be the basis of any renewal of the Orange County municipal permits in 1995**. Under these regulations the municipality is required to demonstrate 'adequate legal authority' to:

-**Control** the contribution of pollutants to the municipal storm drain system by **stormwater discharges associated with industrial activity**…"

- Require compliance with conditions in ordinances.

- **Carry out all inspections, surveillance and monitoring procedures necessary to determine compliance and noncompliance with permit conditions,** and effectively prohibit illicit discharge to the municipal storm drain system. AR 60.

[108] 2000 DAMP Appendix E.1 and E.2. See also discussion at section F.5.b of this Response. AR 17.

[109] Order No. 90-38 section IV.G.1 and XVI.E; Order No. 96-03 section V.5.b and V.13. AR 5.

assertions, the permit requires only that the Copermittees enforce their local ordinances at these facilities. The SDRWQCB will enforce the statewide general permits.

4. Requirements to Implement BMPs and Inspect Commercial Facilities For Compliance with The Orange County Water Quality Ordinance Are Lawful and Must Be Included in the Jurisdictional Urban Runoff Management Program.

In its arguments regarding commercial facilities, the Petitioner fails to note that very few, if any, commercial facilities are covered under state or federally issued permits and thus are not subject to regulation by the SDRWQCB. The Petitioner further fails to acknowledge that the **Copermittees themselves have acknowledged their responsibilities to implement site-specific BMPs to reduce pollutants from commercial areas** and ensure compliance with their Water Quality Ordinance under both previous permits[110] and the DAMP[111]. Moreover, the Petitioner disingenuously fails to acknowledge the significant degree of freedom provided by the SDRWQCB to the Copermittees to determine when inspections of high priority commercial facilities are even needed.[112] The Permit does not even require "as needed" inspections of medium and low priority commercial sites, but leaves this matter entirely to the discretion of the Copermittees. The Petitioner's own assertions in this matter are contrary to the Federal NPDES Regulations, previous permits, and the Petitioner's own program, which they describe as "evolving" and implementing "proven and cost effective" BMPs. These assertions should therefore be denied

5. The Petitioners Contentions Do No Possess Merit And Should Be Denied.

Thus, although Order No. R9-2002-0001 includes specific performance standards for the implementation of BMPs and the performance of inspections to the MEP to ensure compliance with local ordinances at construction sites, commercial, and industrial facilities, it does not in fact establish "new" requirements, but rather attempts to refine and improve upon often poorly implemented requirements of previously adopted Orders and the DAMP. Given that (1) the Petitioner has previously implicitly consented to these requirements in the draft Implementation Agreement cited in Order No. 90-38; (2) that they did not previously challenge similar requirements in two previous permits; (3) that these requirements and their regulatory basis are generally included in the DAMP;

[110] Order No. 90-38 section VI.A.3.a required "Implementation of site-specific BMPs which are required to reduce pollutants in the stormwater discharges from residential, **commercial,** and industrial areas, and construction sites." Order No. 96-03 section V.11.a further required that the Copermittees shall implement "A mechanism to determine compliance of industrial facilities, **commercial facilities**, and construction sites with storm water ordinances and concerns;" AR 5.

[111] 1993 DAMP Sec. 3.1 p. 17: "**EPA regulations require** that storm water quality management plans include programs that address four types of pollutant sources (1) **Runoff from commercial** and residential areas; (2) Runoff from industrial sites (3) Runoff from construction sites; and (4) Non-storm water discharges". AR 60.

[112] Permit section F.3.c.(4) "Each Copermittee shall inspect **high priority commercial sites and sources as needed**" (emphasis added). AR 1.

(4) that the Orange County Water Quality Ordinance and Enforcement Consistency Guide reflect these requirements and empower the City to implement and enforce them; and (5) that these requirements are clearly and explicitly established in the Federal NPDES Regulations and subsequent guidance, the Petitioner's arguments that the SDRWQCB has now, twelve years later, somehow exceeded its authority and unlawfully delegated its responsibility are without merit. For these and all the foregoing reasons, the Petitioner's appeal of these requirements should be denied.

G. THE SDRWQCB HAS NOT INFRINGED UPON THE LOCAL LAND USE AUTHORITY OF THE PETITIONER.

Contrary to the Petitioners allegations, the Permit requirements for Land-Use Planning for New Development and Redevelopment do not violate the policies and purpose of the Porter-Cologne Act, Clean Water Act, CEQA, or other applicable state and federal laws which grant the Petitioner the authority to review "discretionary" projects for purposes of considering whether such projects will have a significant adverse impact on the environment and adopting as necessary appropriate mitigation measures. Consideration of the effects of new development and redevelopment on water quality during the project approval process helps ensure that potential water quality problems resulting from the project are identified and addressed before construction.

1. Federal NPDES Regulations And The Clean Water Act Require Urban Runoff Management Programs To Include Planning Procedures And A Comprehensive Master Plan.

Contrary to the Petitioner's assertions, the SDRWQCB has properly included general requirements mandated in the Federal NPDES Regulations and consistent with the broad legal authority granted to it by the Clean Water Act section 402(p)(3)(B)(iii). The requirements for the amendment of General Plans is directly specified in the Federal NPDES Regulations at 40 CFR 122.26(d)(2)(iv)(A)(2). They state that Copermittees' urban runoff programs shall include "planning procedures including a **comprehensive master plan** to develop, implement, and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment" (emphasis added). US EPA guidance for this regulation further states that Copermittees "must thoroughly describe how the municipality's comprehensive plan is compatible with the storm water regulations."[113] Therefore, in order to be in compliance with the Federal NPDES Regulations, municipal storm water permits must include requirements for water quality provisions in the Copermittees' General Plans.

[113] US EPA, 1992. Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems. EPA 833-B-92-002. Pg. 6-4. AR 27.

2. The Permit Requirements Were Included In Previous Permits And The DAMP.

Order No. 96-03, the second-term MS4 permit for Orange County, required a "review of planning procedures and CEQA document preparation processes to insure that storm water related issues are properly considered. If necessary, these processes shall be revised to include storm water requirements for evaluation of appropriate mitigation measures."[114] Furthermore, the 2000 DAMP states "The federal regulations specify that drainage area management plans include a description of planning procedures including a comprehensive master plan to develop, implement, and enforce controls to reduce the discharge of pollutants…from areas of new development and significant redevelopment."[115] The 2000 DAMP also states "NPDES Stormwater Permit compliance requires that storm water quality management is considered during a project's planning phase, implemented during construction, and ultimately maintained for the life of the project. Applying this concept to new development, it is intended that each new development will incorporate the approved programs of BMPs to minimize the amount of pollution entering the drainage system." The 2000 DAMP also includes in both discretionary and non-discretionary permit issuance levels a mechanism similar, but much weaker than the SUSMPs, in the form of a Water Quality Management Plan (WQMP). The 2000 DAMP states the WQMP "shall include a description of the discretionary and ministerial permit issuance levels…include a description of the project and an outline of which BMPs apply to the project…Upon review of the WQMP, each municipality will require project incorporation of the identified routine structural and non-structural BMPs."[116] As a result, the Petitioner having presumably complied with these requirements previously could easily have anticipated that such requirements would be necessary upon adoption of a third-term MS4 permit and does not present a convincing argument that these requirements "improperly infringe upon and interfere with local land use planning and regulatory authority" of the Petitioner. The Petitioner's contention in this matter is without merit and should be denied.

3. The Permit Does Not Impermissibly Infringe Upon The Petitioners Authority To Carry Out Land-Use Planning.

The Permit does not impermissibly infringe on the Petitioner's ability to carry out their land use planning authority and responsibilities. The SDRWQCB concedes that both the Clean Water Act and California law anticipate that local land use planning and zoning will be carried out on the municipal level as asserted by the Petitioner.[117] However, the SDRWQCB strongly disagrees that the Permit amounts to land use planning or fundamentally changes the local land use planning process. The Permit places no constraints on what land uses a municipality may authorize within its jurisdiction. Further, the Permit does not dictate how a municipality may zone its jurisdiction. Simply

[114] SDRWQCB Order No. 96-03 section V.26. AR 6.
[115] 2000 DAMP at section 7 "New Development/Significant Redevelopment, Regulatory Requirements." AR 17.
[116] 2000 DAMP Appendix G section 5.0.3-4 at pp. G-8 to G-9. AR 17.
[117] Petitioner's Petition For Review section E.g. at p. 11 referencing 33 U.S.C. § 1251(b) (preserving state's primary responsibilities and rights to plan development and use of land resources).

put, there is no land use planning or zoning done by the SDRWQCB through the Permit. At most, the Permit could be construed to place certain **conditions** on various **types** of land uses related to their potential to result in pollutant discharges from the MS4 to receiving waters (e.g., the provision that municipalities require residential developments exceeding ten units to undertake certain mitigation measures or require developments on hillsides to undertake certain mitigation measures (Permit section F.1.b.2)). These Permit conditions were adopted by the SDRWQCB to reduce pollutants from the MS4 to the maximum extent practicable in accordance with Clean Water Act section 402(p)(B)(iii) and the Federal NPDES Regulations. These provisions do not invade the Petitioner's fundamental choice to make land use decisions and zone accordingly. As with many other Federal or State permitting and regulatory functions, the Permit simply provides contours around which the municipalities must carry out their land use and zoning responsibility.

The Petitioner asserts that the Permit's requirement that each Copermittee's General Plan include water quality and watershed protection principles improperly impinges on the Copermittees' land use authority. However, as discussed above, the Petitioner fails to note the broad nature of the requirement, in that it does not specify the type or content of the principles to be included in the General Plan. Moreover, it is left to the Petitioner to determine if its General Plan should be revised. Likewise, all detail regarding the water quality and watershed principles to be included in the General Plan are left to the discretion of the Petitioner. A requirement that does not specify the contents of General Plan revisions does not encroach on land use authority.

The Petitioner further alleges that compliance with the SUSMP requirements would impinge on the Copermittees' land use authority. Again, no discussion as to why the SUSMP requirements would encroach on the Copermittees' land use authority is provided. In truth, the SUSMP provisions do not place any limits on the type or location of any land use. The SUSMP provisions only seek to ensure that the development of an area does not negatively impact receiving water quality. The Copermittees are left to develop various land uses within their jurisdictions however they choose. The SUSMP provisions even include a waiver provision that allows projects to be waived from the SUSMP requirements if meeting the requirements is found to be infeasible. This waiver provision serves to further ensure that SUSMP implementation will not impact land use decisions. Furthermore, and most importantly, the SWRCB, in its December 26, 2000 memo from Craig M. Wilson to the RWQCB Executive Officers, states "that design standards for BMPs for new development and redevelopment [i.e., SUSMPs] are required [and] must be implemented."[118] Therefore, the SWRCB has already determined that the SUSMP provisions are appropriate and do not impinge on local land use authority.

With respect to discretionary and non-discretionary projects, the SWRCB has noted the necessity for application of the SUSMP requirements to non-discretionary projects in Order WQ 2000-11 in the statement that "the limitation of the SUSMPs to discretionary projects may not be sufficiently broad for an effective storm water control program […]" (at pg. 26). Regarding non-discretionary projects, the SWRCB has stated in the

[118] SWRCB, December 26, 2000 memo from Craig M. Wilson to the RWQCB Executive Officers. AR 70.

aforementioned December 26, 2000 memo that its Order WQ 2000-11 "allows broader discretion by the Regional Boards to decide whether to include additional types of development in future SUSMPs. These areas for potential future inclusion in SUSMPs include […] ministerial projects […]." It is noteworthy that the SWRCB dismissed the contention that post-construction requirements should be limited to "discretionary" approvals in Order WQ 2001-15.[119]

4. The Permit Does Not Modify or Violate the California Environmental Quality Act.

The Petitioner alleges that the Permit requires modification to the Petitioner's CEQA process in violation of State law. The Petitioner fails to note, however, that section F.1.b makes no reference to the CEQA process and that the requirements refer only to development project requirements and not CEQA.[120] In fact, the Permit makes only a single reference to the CEQA process in Finding 39 in which it finds that the issuance of waste discharge requirements is exempt from the requirements to prepare environmental documents under CEQA. Furthermore, this section properly requires only that the "Copermittees shall require each proposed project to implement measures to ensure that pollutants and runoff from the development will be reduced to the maximum extent practicable and will not cause or contribute to an exceedance of receiving water quality objectives. Each Copermittee shall further ensure that all development will be in compliance with Copermittee storm water ordinances, local permits, and all other applicable ordinances and requirements, and this Order."[121] Moreover, the Development Project Requirements do not themselves infringe upon CEQA. Rather, they specifically address (1) pollutant reduction to the MEP from the development project, (2) a mechanism to ensure long-term maintenance of BMPs, (3) compliance with construction BMP requirements in section F.2 of the Permit, (4) require Industrial applicants to provide evidence of coverage under the statewide General Industrial Permit, (5) where feasible to include site design/landscape characteristics to minimize impervious surfaces, and (6) implement buffer zones for natural water bodies.[122] The inclusion of these requirements does not infringe upon the CEQA process and have been found by the SDRWQCB to be necessary to reduce pollutants in urban runoff to the MEP.[123]

The Petitioner further asserts that the SDRWQCB has exceeded its authority because CEQA, not NPDES permits, controls the mitigation of significant environmental impacts created by such projects and is the proper vehicle to regulate development. This contention, however, is ill informed and based upon a flawed premise. First of all, the permit is a permit to discharge waste and as discussed above does not attempt to regulate development beyond requiring BMPs to reduce pollutants to the MEP. Second, the Clean Water Act and Federal NPDES Regulations so clearly authorize the SDRWQCB to issue

[119] SWRCB Order WQ 2001-15 part I and footnote 10. AR 11.
[120] The San Diego MS4 Permit did contain such a reference, but that reference was properly removed in response to comments and was never incorporated in the draft Permit for southern Orange County.
[121] Permit section F.1.b at p. 14. AR 1.
[122] Permit section F.1.b.1 at pp. 14-15. AR 1.
[123] The relevant findings regarding these issues include 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 16, 17, 18, 19, 20, 21, 22, 30, 31, and 33, which are discussed in detail in the fact Sheet/Technical Report. AR 1 and AR 2.

permits to operators of MS4s to reduce pollutants in MS4 discharges that the Petitioner's contention on this issue is simply without foundation. With respect to Finding 21, which the Petitioner cites in a flimsy attempt to support its contention, the Finding does not necessarily refer to land use planning or CEQA, but rather it refers broadly to the previously implemented policies and practices (e.g. the DAMP) aimed at preventing and reducing pollutants in MS4 discharges.

5. The SWRCB Has Previously Supported The Relevant Requirements To Include Water Quality Protection Provisions In General Plans And SUSMP Requirements For New Development And Redevelopment.

As discussed above, the SWRCB has supported the Permit requirements particularly with respect to the SUSMP provisions in Orders WQ 2000-11 and WQ 2001-15. The Permit and Fact Sheet/Technical Report were revised to conform to the Orders and guidance cited above and thus the requirements are lawful and justified. The Petitioner's allegations in this matter are without merit and should be denied.

H. THE SDRWQCB HAS NOT EXCEEDED ITS AUTHORITY BY IMPOSING PEAK FLOW CONTROL MEASURES IN PARTS F.1.B.(2).(B).I AND F.1.B.(2).(C) OF THE PERMIT.

The SDRWQCB has not exceeded its authority by imposing peak flow control measures and has justified evidence in the Administrative Record for the need for these controls. Such controls are lawful and necessary to protect beneficial uses and the SWRCB should support its previous findings and direction on this matter by denying the Petitioner's appeal of this matter.

1. MS4 Discharges With Increased Urban Runoff Peak Flow Rates And Velocities Resulting From New Development And Significant Redevelopment Are Regulable Under The Municipal Storm Water Permits And Have Been Supported As Such By The SWRCB.

a. The Requirements Are Supported By The Clean Water Act And Implementing NPDES Regulations.

MS4 discharges with increased urban runoff peak flow rates and velocities resulting from new development and significant redevelopment are regulable under the municipal storm water permits. NPDES permits must protect receiving water quality standards: Federal NPDES regulation 40 CFR 122.44(d)(1) requires municipal storm water permits to include any requirements necessary to "achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality." As discussed below, there is ample evidence that altered flow regimes resulting from new development and significant redevelopment can negatively impact water quality

standards. Municipal storm water permits include requirements for the management of flow in order to protect receiving water beneficial uses and water quality objectives, as required under the Federal NPDES Regulations.

It is also worth noting that exclusion of the NPDES program from the regulation of peak flow rates and velocities defeats the intent of the Clean Water Act. The NPDES storm water program for MS4 discharges is designed to implement the Clean Water Act, which has the primary purpose to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (33 U.S.C. section 1251(a)). As commonly exhibited, increased urban runoff peak flow rates and velocities resulting from new development and significant redevelopment can greatly impact receiving water quality. As such, in order for the NPDES storm water program to adequately protect the chemical, physical, and biological integrity of receiving waters, as it was intended, it must address increased urban runoff peak flow rates and velocities resulting from new development and significant redevelopment.

b. The Requirements Are Supported In The CWC

In addition, the CWC clearly provides discretion to regulate flow in order to protect beneficial uses. In fact, such regulation is not only allowed by the CWC, it is required. CWC section 13377 provides that RWQCBs issue waste discharge requirements as required by the Clean Water Act, "together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance."

Since municipal storm water permits are a set of waste discharge requirements issued under the CWC (which happen to implement the NPDES program), the NPDES program is only a set of minimum standards for municipal storm water permits. The NPDES program requirements are not a limitation on the contents of municipal storm water permits, as they are a set of waste discharge requirements under the CWC. Furthermore, the Federal NPDES Regulations do not set a maximum limit on States' individual implementation of the NPDES program. As such, the State of California can include specific requirements in an NPDES permit that need not be specifically addressed in the Federal NPDES Regulations. However, to the extent that inclusion of such requirements is meant to implement and clarify the NPDES storm water program to protect the region's receiving waters, such requirements do not exceed the NPDES program.

c. This Approach Has Previously Been Supported By The SWRCB.

This approach follows SWRCB guidance. The municipal storm water receiving water limitations language, as drafted by the SWRCB, requires MS4 discharges to be in compliance with water quality standards. This requirement stands regardless of whether the MS4 discharge is causing or contributing to violations of water quality standards through altered flow regimes or pollutant discharges.

Furthermore, regulation of urban runoff discharge peak flow rates and velocities is included in the LARWQCB's SUSMP, which has already been predominantly upheld by the SWRCB in Order WQ 2000-11. The SWRCB found that the LARWQCB SUSMP requirements collectively constitute MEP for urban runoff from new development and significant redevelopment. Therefore, the SWRCB has already found that requirements to control increases in peak flow rates and velocities resulting from new development and significant redevelopment are an appropriate provision of MEP for MS4 discharges. Moreover, the SWRCB has instructed that subsequent municipal storm water permits "must be consistent with the principles set forth [in Order WQ 2000-11]." Towards that end, the SWRCB upheld virtually identical requirements in the San Diego Permit in Order WQ 2001-15, which soundly rejected the argument that erosion cannot be the subject of an MS4 permit. In that Order, the SWRCB stated "It is absurd to contend that the [San Diego County MS4] permit should have ignored this [erosion] impact from urban runoff."[124] The requirements at issue in the Orange County Permit are virtually identical to those previously challenged and upheld by the SWRCB. Furthermore, the minor adjustments in that language were made to provide greater flexibility to the Copermittees to facilitate implementation. In order to be consistent with this SWRCB guidance, municipal storm water permits include regulation of urban runoff peak flow rates and velocities resulting from new development and significant redevelopment.

2. The SDRWQCB Has Identified And Justified The Need For These Requirements.

The regulation of increased urban runoff peak flow rates and velocities resulting from new development and significant redevelopment is a direct attempt to control the discharge of conventional pollutants in urban runoff to the MEP. Typical BMPs which control urban runoff peak flow rates and velocities (such as detention basins and grass swales) can greatly reduce the amount of pollutants (suspended solids, nutrients, and metals) in urban runoff. Control of these pollutants in such a manner is certainly within the purview of the NPDES program and municipal storm water permits. US EPA supports this approach, stating "in many cases, consideration of the increased flow rate, velocity and energy of storm water discharges following development unavoidably must be taken into consideration in order to reduce the discharge of pollutants."[125]

In addition, the downstream erosion caused by increased urban runoff peak flow rates and velocities constitutes a discharge of pollutants to receiving waters which needs to be reduced to the MEP. The increased volume, flow rate, velocity, and duration of runoff resulting from new development and redevelopment can increase sediment transport, stream bed scouring, shoreline erosion, stream bank widening, and changes in stream morphology. All of these impacts can negatively impact water quality through their discharge of sediment into receiving waters. Unnaturally elevated levels of sediment suspension and transport can cause extended violations of water quality objectives for turbidity, total suspended solids, color, and floating material. Moreover, since sediment

[124] SWRCB Order WQ 2001-15 at footnote 8 p. 3. AR 11.
[125] 64 FR 68761. AR 82.

is often a transport mechanism for other pollutants, discharge of such sediment can lead to introduction of pollutants into the water column, further impacting receiving water quality. Due to the increased discharge of pollutants to receiving waters resulting from the increased peak flow rate and velocity of MS4 urban runoff discharges, regulation of urban runoff peak flow rate and velocity is applicable for an NPDES permit. It constitutes reduction to the MEP of pollutant discharges to receiving waters. In the Permit Findings and supporting information in the Fact Sheet/Technical Report, the SDRWQCB has demonstrated a need for these requirements.[126] In addition, a number of documents in the Administrative Record further support the inclusion of these requirements in the Permit.[127]

In addition, the Petitioner erroneously states that the Permit requires the Petitioner to conduct a Peak Discharge Impact Study and develop numerical criteria for peak flow control. The Petitioner appears to have mistaken the MS4 Permit adopted by the Los Angeles RWQCB for the Permit at issue since no such requirement exists in Order No. R9-2002-0001.[128]

3. There Is Ample Precedence For Including Controls To Prevent Downstream Erosion In NPDES Storm Water Permits.

Finally, control of runoff to prevent downstream erosion has previously been included in many NPDES storm water permits, both within the State of California and nationwide. For example, section A.8 of the SWRCB's Statewide General Construction Storm Water Permit (Order No. 99-08-DWQ) directly requires control of runoff velocity to prevent downstream erosion when it states "the outflow of a sediment basin that discharges into a natural drainage shall be provided with outlet protection **to prevent erosion and scour of the embankment and channel**" (emphasis added).[129] As discussed above, the LARWQCB has also included requirements to control flow for erosion prevention in its SUSMP for the cities of Los Angeles County, as well as in its municipal storm water permit for Ventura County (Order No. 00-108). Moreover, states such as Washington[130]

[126] Findings 4, 5, and 21 address the impacts of modified peak flows resulting from urban development and increased impervious surface area and the need for changes in management programs. The Fact Sheet/Technical Report further addresses these impacts at pp. 48-50, 62-63, 109-112. AR 1. AR 2.
[127] The need for these requirements as documented in the Findings and supporting information in the Fact Sheet/Technical Report is further substantiated by articles published by the Center for Watershed Protection including: Article 14 "Impact of Suspended and Deposited Sediment," AR 71; Article 18 "Effects of Urbanization on Small Streams in the Puget Sound Ecoregion," AR 72; Article 19, "Dynamics of Urban Stream Channel Enlargement" AR 73; Article 27 "The Tools of Watershed Protection," AR 74; Article 28 "Basic Concepts in Watershed Planning," AR 75; Article 47 "The Benefits of Better Site Design in Commercial Development," AR 76; Article 63 "Why Stormwater Matters," AR 77; and Article 66 "Stormwater Strategies for Arid and Semi-Arid Watersheds," AR 78;
[128] Petitioner's Statement of Points and Authorities in Support of Petition to Review section X at p. 20.
[129] SWRCB Statewide General Construction Storm Water Permit section A.8 at pg. 15. AR 12.
[130] Washington State Department of Ecology 1999 Draft Storm Water Management in Washington State A.R. Document No. 36. AR 79.

and Maryland[131] have similar NPDES storm water permit requirements cited in the Permit's supporting documents.[132] Other aspects of the issue were addressed in more detail in the Fact Sheet/Technical Report Attachment 6 Response to Comments Document.[133]

Thus, for all of the foregoing reasons, the SWRCB should uphold its previous findings and the SDRWQCB Permit requirements and deny the Petitioner's appeal in this matter.

I. THE SDRWQCB IS NOT REQUIRED TO PERFORM A COST BENEFIT ANALYSIS, BUT PROPERLY CONSIDERED ECONOMIC CONSIDERATIONS AND OTHER PERTINENT FACTORS DURING ITS DELIBERATIONS.

1. The SDRWQCB Is Not Required To Perform A Cost Benefit Analysis.

The Petitioner offers arguments concerning economic issues that closely parallel arguments previously presented to the State Board in petitions to review other MS4 permits. In Order 2000-11, the State Board rejected any contention that a RWQCB is required to conduct a cost-benefit analysis as part of developing an MS4 permit: "It is clear that cost should be considered in determining MEP; this does not mean that the Regional Water Board must demonstrate that the water quality benefits outweigh the economic costs." [134]

The Petitioner has also asserted that various provisions of the Porter-Cologne Water Quality Control Act (Porter-Cologne Act) similarly require a cost-benefit analysis. Although the Petitioner references several provisions purportedly requiring economic consideration, the Petitioner relies on general statements in the Water Code to support its argument in favor of a cost benefit analysis. It is interesting to note that the Petitioner cites CWC section 13000, but neglects the context in which economic factors are discussed. The relevant section of CWC section 13000 reads: "The Legislature further finds and declares that activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable, **considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible**" (emphasis added).[135] This section further states: "…the state must be prepared to exercise its full power and jurisdiction to protect the quality of waters in the state from degradation…" As discussed below, the SDRWQCB has properly considered all of the aforementioned factors and others besides. Although the Petitioner in citing CWC section 13000 has correctly observed that the SDRWQCB is required to consider

[131] Maryland Department of the Environment 1999 Draft 2000 Maryland Stormwater Design Manual. AR 80.
[132] Fact Sheet/Technical Report Attachment 6 Response to Comments Document pp. 136-140. AR 2.
[133] Fact Sheet/Technical Report Attachment 6 Response to Comments Document pp. 144-145. AR 2.
[134] SWRCB Order WQ 2000-11, pp. 19-20. AR 10.
[135] CWC section 13000 paragraph 2. AR 81.

economic considerations, the Petitioner has ignored a key message incorporated in that policy by the Legislature: that the state through its RWQCBs should exercise its full power and jurisdiction to protect receiving waters and their beneficial uses. [136] It is noteworthy, therefore, that the Petitioner, throughout its Petition, has in fact challenged the SDRWQCB's full exercise of its discretion provided by the Clean Water Act, implementing Federal NPDES Regulations, and CWC.

The Petitioner also cites CWC section 13225 in its argument its assertion that a cost-benefit analysis is required. However, CWC section 13225 does not govern the issuance of this permit. Moreover, the SDRWQCB does not even cite CWC section 13225 as an authority in its adoption of the Permit. This section is referenced in the Fact Sheet/Technical Report only in the context of the Water Code Section 13225 Directive for an Investigation of Urban Runoff in the Aliso Creek Watershed, to which the Petitioner is presently a responsible party, and to certain monitoring requirements.[137] Section 13225 appears in Article 2 (General Provisions Relating to Powers and Duties of Regional Board) of Chapter 4 (Regional Water Quality Control) of the Porter-Cologne Act. Section 13225 empowers the SDRWQCB to require local agencies to report on "technical factors involved in water quality control." (CWC section 13225.) This authority is a general authority that the SDRWQCB can use outside the context of a specific investigation (CWC section 13267) or waste discharge requirements (CWC section 13263) as part of the SDRWQCB's responsibilities to assess water quality and to develop water quality control strategies for the region. The general authority does not trump the more specific authority the SDRWQCB has in the context of issuing waste discharge requirements. [138]At most, the SDRWQCB is required to consider economic issues, a duty that it properly performed as discussed below. The SWRCB Order 2000-11 discussion was framed in the context of the Clean Water Act and Federal regulations governing the MEP standard. As a result, that Order provides the relevant standard for the reissuance of the Permit.

The Petitioner also cites CWC sections 13165 (Water Quality Factors), 13241 (Water Quality Objectives), and 13267 (Investigations; inspections). For reasons similar to those discussed above regarding CWC section 13225, CWC sections 13165 and 13267 do not necessarily apply to the issuance of waste discharge requirements or NPDES permits. In fact, CWC section 13165 was not cited by the SDRWQCB in the Permit or Fact Sheet/Technical Report. With respect to the requirements that the costs of the reports required by the SDRWQCB shall bear a reasonable relationship to the need for the reports, as discussed in detail below, the SDRWQCB has properly considered the burden of the costs and their relationship to the requirements contained in the Permit. In addition, CWC section 13241 refers to requirements of the SDRWQCB in adopting the Basin Plan, requirements that were satisfied. The SDRWQCB only referred to that

[136] CWC at section 13000 paragraph states that "the statewide program for water quality control can be most effectively administered regionally, within a framework of statewide coordination and policy." AR 81.
[137] Fact Sheet/Technical Report Attachment 6 Response to Comments Document pp. 20, 103, and 201. AR 2.
[138] CWC at section 13263(a). AR 81.

authority in the context of the requirement for the Permit to implement requirements contained in the Basin Plan.

In regards to the Petitioner's contention that the SDRWQCB has not discharged it duties as required in 33 U.S.C §§ 1288, 1313, 1315(b), and 64 Fed. Reg. 68722, and 68732, these contentions are also flawed and do not apply to the adoption of the Permit. In particular, 33 U.S.C. §§ 1288, 1313, 1315(b) apply to Publicly Owned Treatment Works, water quality standards and implementation plans, State reports on water quality, respectively. 64 Federal Register 68722 and 68732 are references to the Phase II NPDES Storm Water Regulations and simply do not support the Petitioner's argument.

2. The SDRWQCB Properly Gave Full Consideration To Economic Considerations In Adopting Order No. R9-2002-0001.

The Administrative Record contains numerous references addressing the requirement of the SDRWQCB to give full consideration to economic concerns and other factors. In particular, the SDRWQCB staff invited comments on cost and other economic factors at its two staff workshops in July and August of 2001. In the Fact Sheet/Technical Report[139] and during the public hearing on Tentative Order R9-2002-0001 staff addressed costs and economic considerations and advised the SDRWQCB of its responsibility to give full consideration to the issues of costs and other economic considerations.[140] In particular, it should be noted that the SDRWQCB conformed with the policy of the Legislature as expressed in CWC section 13000 in considering beneficial as well as detrimental economic factors in its deliberations on the Tentative Order prior to adoption.[141] As demonstrated in the Administrative Record, the SDRWQCB received and responded to ample written testimony on economic factors from a number of commenters.[142] In addition, nearly all of the Copermittees addressed the issue of costs in their verbal testimony before the SDRWQCB during the January 9, 2002 public hearing on the draft Permit. Costs and other economic factors were a significant component of the SDRWQCB's consideration of the MS4 permit and the SDRWQCB properly fulfilled its duties in this matter.

[139] The Fact Sheet/Technical Report includes extensive discussion of economic factors in section III and in Attachment 6 Response to Comments Document pp. 3-12, 44-45, 69, 71-72, 75-76, 78, 128, 165, and 200-203. AR 2.

[140] Staff presentation by Dave Gibson to the SDRWQCB regarding Tentative Order No. R9-2002-0001. AR 32.

[141] Fact Sheet/Technical Report section III; Attachment 6 Response to Comments Document pp. 3-12 in which the County of Orange references § 13000 in its discussion of the SDRWQCB's responsibility to consider costs and other economic factors and identifies beneficial as well as detrimental impacts that could arise following the adoption of the Permit. AR 2.

[142] Supporting Document 4 Written Comments, Agenda Package for Item 8, January 9, 2002 Waste Discharge Requirements for Discharges of Urban Runoff from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watershed of the County of Orange, the Incorporated Cities of Orange County and the Orange County Flood Control District (Tentative Order No. 2001-193, NPDES Permit No. CAS0108740). AR 42. AR 43. AR 44.

For these and all of the foregoing reasons, the Petitioner's appeal on this matter is without merit and should be dismissed.

J. THE FEDERAL PAPERWORK REDUCTION ACT, CALIFORNIA GOVERNMENT CODE §11346.3, AND THE HEALTH AND SAFETY CODE §57004 DO NOT CONTROL THE ISSUANCE OF A PERMIT TO DISCHARGE WASTE (WASTE DISCHARGE REQUIREMENTS) UNDER THE FEDERAL NATIONAL POLLUTION DISCHARGE ELIMINATION SYSTEM PROGRAM (NPDES).

As discussed above, a central flaw in the Petitioner's appeal, which is relevant to these and other issues, is the Petitioner's failure to discriminate between the issuance of a permit for the discharge of wastes and the process of rulemaking - such as the adoption of a Water Quality Control Plan. Although the Petitioner repeatedly and pointedly refers to itself as a "Permittee" and to the "Permit" elsewhere in its appeal contesting the actions of the SDRWQCB, they apparently have confused the adoption by the SDRWQCB of a NPDES Permit and Waste Discharge Requirements, which authorize the Petitioner to discharge waste, with the promulgation or adoption of a regulation or rule in presenting these arguments. The Federal Paperwork Reduction Act, California Government Code §11346.3, and the Health And Safety Code §57004 are applicable to the adoption of regulations (rulemaking), but are not applicable to the issuance of Waste Discharge Requirements and NPDES Permits. Throughout the sections of these statutes and regulations quoted by the Petitioner, the applicable action is the adoption of a "regulation" or a "rule."[143] For the reasons discussed above and elsewhere in this Response, the Petitioner's allegations in this matter are disingenuous, without merit, and should be dismissed in these matters.

K. THE SDRWQCB DOES NOT SEEK TO SHIFT STATUTORY RESPONSIBILITY TO ENFORCE THE GENERAL PERMITS TO THE PETITIONER.

As discussed in detail above and documented at many points in the Administrative Record, the SDRWQCB does not seek to shift its statutory responsibilities to enforce general permits to the Petitioner or other Orange County Copermittees. Furthermore, the SDRWQCB has the legal authority and regulatory justification to require the Copermittees to enforce their local ordinances (e.g. Orange County Water Quality Ordinance). As previously discussed, the Orange County Water Quality Ordinance and Enforcement Consistency Guide, which were adopted by the Petitioner, demonstrate that the Copermittees represented this responsibility in the development of their own programs (i.e. the DAMP) to inspect and enforce their local ordinances at these facilities

[143] See for example Petitioner's citations at pp. 12, 13 of its Petition For Review and pp. 10, 20-21, and 23-24 (note text emphasized by Petitioner) of Petitioner's Statement Of Points And Authorities In Support Of Petition For Review.

and that the SDRWQCB will inspect and enforce the general statewide permits that those same facilities. Neither the Permit language nor any statements from the SDRWQCB contradict this long-standing approach to dual regulation of construction sites and industrial facilities subject to the general statewide permits.

L. THE SDRWQCB ACTION IN ADOPTING THE PERMIT IMPOSES OBLIGATIONS MANDATED AND SUPPORTED BY STATE AND FERDERAL LAW AND REGULATIONS THAT ARE APPROPRIATE AND APPLICABLE TO PETITIONER'S JURISDICTIONAL AUTHORITY.

The Petitioner asserts that "Individual permittees only have the responsibility and ability to prohibit non-storm water discharges over which they have actual control and not over all which occur within their jurisdiction." The Petitioner also interprets the 40 CFR 122.26(b)(1) definition of a "co-permittee" as applying a limitation to the responsibility and authority of the Petitioner to adopt and enforce ordinances that prohibit non-storm water discharges to the MS4. Contrary to the Petitioner's contentions, the Permit does not make the Petitioner responsible for "any discharge within its boundaries," rather the Permit holds the Petitioner responsible for any discharges into its MS4 from which it is authorized to discharge waste. It is both lawful and necessary that the SDRWQCB require this responsibility of the operator of a MS4; especially considering the nearly universal lack of mechanisms to treat or remove pollutants in discharges from MS4s prior to discharge to receiving waters. The Petitioners contentions are disingenuous and contradict the Clean Water Act and implementing Federal NPDES regulations and are not consistent with the Petitioner's own DAMP and adopted Orange County Water Quality Ordinance and Enforcement Consistency Guide.

1. The Clean Water Act And Implementing Federal Regulations Identify The Petitioner's Responsibility To Effectively Prohibit Non-Storm Water Discharges To The MS4.

Clean Water Act section 402(p)(3)(B) plainly states "Permits for discharges from municipal storm sewers – …(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers." This language makes no allowance for ownership of the discharge; it explicitly requires that it be "effectively prohibited" as a permit condition. Furthermore, the Petitioner's arguments regarding the definition of a Copermittee in the Federal NPDES Regulations at 40 CFR 122.26(b)(1) are disingenuous. The Federal NPDES Regulations clearly require permit conditions (including the requirement to effectively prohibit non-storm water discharges into the MS4) as a permit condition upon a Permittee that owns or operates said MS4. It does not, as implied by the Petitioner, excuse the Petitioner from any responsibility for effectively prohibiting the non-storm water discharge.

It is useful to reconsider the US EPA discussion of discharges to the MS4 from third parties, which were discussed in detail above. As previously discussed, the US EPA has

observed that "…the nature and extent of pollutants in discharges from municipal systems will depend on the activities occurring on the lands which contribute runoff to the system." [144] The US EPA also stated that:

> *"In light of its construction of the term discharge, EPA has consistently maintained that a* ***person who sends pollutants from a remote location through a point source into a water of the U.S. may be held liable for the unpermitted discharge of that pollutant.*** *Thus, the EPA asserts the authority* ***to require a permit either from the operator of the point source conveyance, (such as a municipal storm sewer*** *or a privately-owned treatment works****), or from any person causing pollutants to be present in that conveyance and discharged through the point source, or both****."* (Emphasis added)[145]

This statement clearly belies the contention of the Petitioner and places a burden of responsibility upon the permitted owner or operator of the MS4 for discharges to the MS4, including discharges that may be allowable under other permits. Such responsibility (i.e. Petitioner's "control") is clearly contemplated in the Federal NPDES Regulations in the context of permit requirements to effectively prohibit non-storm water discharges and control pollutants in discharges to the MS4 and through the implementation of pollution prevention and source reduction management practices, control techniques, and design features for discharges to the MEP. It is worth repeating that the US EPA in this document and the regulations themselves did not preclude the application of BMPs or other controls at locations above the point of discharge, including prior to discharge into the MS4.

2. The Petitioner Has Previously Acknowledged and Assumed These Responsibilities Under Previous Permits and The DAMP.

As previously discussed in detail, the Petitioner's own adopted Orange County Water Quality Ordinance and[146] and the DAMP[147] acknowledged and assumed these responsibilities required under previous permits that the Permit now seeks to build upon and improve with more detailed language. The Permit and Fact Sheet/Technical Report

[144] US EPA 1990 Preamble to National Pollution Discharge Elimination System Permit Application Regulations for Storm Water Discharges. Section VI.G.3 at 47038. Federal Register Vol. 55 No. 222. AR 65.

[145] US EPA 1990 Preamble to National Pollution Discharge Elimination System Permit Application Regulations for Storm Water Discharges. Section VI.B at 47998. Federal Register Vol. 55 No. 222. AR 65.

[146] See for example Orange County Water Quality Ordinance sections III and IV. AR 17 (Appendix E-1).

[147] See for example section 4.1 which states Sec. 4.1: "The NPDES Storm Water Permits require implementation of a program to reduce pollutants in storm water discharges from commercial, industrial, and residential areas to the 'maximum extent practicable.' Central to this program is the establishment, by each municipality, of adequate legal authority to **regulate the discharge of pollutants to the municipal separate storm sewer**"; AR 60.

correctly includes requirements addressing the Petitioner's responsibility for third party discharges into its MS4.[148, 149]

For the foregoing reasons, the Petitioner fails to demonstrate that the SDRWQCB acted in excess of its constitutional and statutory jurisdiction and its Petition in this matter is without merit and should be denied.

III. CONCLUSION

The requirements of the Permit as adopted by the SDRWQCB are necessary and authorized by state and federal statute and regulations. In adopting the Permit the SDRWQCB acted properly based on the evidence presented before it and the rule of law. Therefore, for all the foregoing reasons stated above, the SDRWQCB requests the SWRCB to find Petitioner's claims invalid and deny the Petition.

[148] In Finding 15 the SDRWQCB identifies the Copermittee's responsibility for illicit discharges from third parties. Permit Prohibitions in sections A and B implement the Clean Water Act and Federal NPDES Regulations. Section D requires the Petitioner to establish, maintain, and enforce adequate legal authority to control pollutant discharges into and from its MS4 through ordinance, statute, permit, contract, or similar means. AR 1.

[149] Fact Sheet/Technical Report includes discussions of these requirements and their legal and regulatory foundations at pp. 58-59, 64-65, and 94; and in Attachment 6 Response to Comments Documents at pp. 98-99 and 188-119. AR 2.